91-177

CASE NO. _____

Supreme Court, U.S.
FILED
JUL 24 1991
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

October Term, 1990

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,
Petitioner,

v.

RONALD WOODS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT A. BUTTERWORTH
Attorney General

RICHARD B. MARTELL
Assistant Attorney General
Florida Bar No. 300179

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

I

WHETHER *HOLBROOK v. FLYNN,* 475 U.S. 560 (1986), AUTHORIZES THE HOLDING OF THE FEDERAL COURT OF APPEALS BELOW, TO THE EFFECT THAT THE MERE PRESENCE OF NONDISRUPTIVE UNIFORMED SPECTATORS AT A STATE CRIMINAL PROCEEDING DEPRIVES THE DEFENDANT OF A FAIR TRIAL AND MANDATES THE GRANTING OF A WRIT OF HABEAS CORPUS AND THE DEFENDANT A NEW TRIAL

II

WHETHER *SHEPPARD v. MAXWELL,* 384 U.S. 333 (1966), AUTHORIZES THE HOLDING OF THE FEDERAL COURT OF APPEALS BELOW, TO THE EFFECT THAT RELIEF CAN BE AFFORDED TO A STATE HABEAS PETITIONER, ON THE GROUNDS OF PRESUMPTIVELY PREJUDICIAL PRETRIAL PUBLICITY, WHEN THE RECORD IN THE CASE CONTAINS NO EVIDENCE OF THAT PUBLICITY, DEFENSE COUNSEL NEITHER EXERCISED ALL OF HIS PEREMPTORY CHALLENGES NOR RENEWED HIS MOTION FOR CHANGE OF VENUE, AND THE COURT OF APPEALS RELIED UPON EXTRA-RECORD MATERIALS, NEVER PRESENTED TO THE STATE OR DISTRICT COURT

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 12

I WHETHER *HOLBROOK v. FLYNN,* 475 U.S. 560 (1986), AUTHORIZES THE HOLDING OF THE FEDERAL COURT OF APPEALS BELOW, TO THE EFFECT THAT THE MERE PRESENCE OF NON-DISRUPTIVE UNIFORMED SPECTATORS AT A STATE CRIMINAL PROCEEDING DEPRIVES THE DEFENDANT OF A FAIR TRIAL AND MANDATES THE GRANTING OF A WRIT OF HABEAS CORPUS AND THE DEFENDANT A NEW TRIAL 12

II WHETHER *SHEPPARD v. MAXWELL,* 384 U.S. 333 (1966), AUTHORIZES THE HOLDING OF THE FEDERAL COURT OF APPEALS BELOW, TO THE EFFECT THAT RELIEF CAN BE AFFORDED TO A STATE HABEAS PETITIONER, ON THE GROUNDS OF PRESUMPTIVELY

PREJUDICIAL PRETRIAL PUBLICITY, WHEN THE RECORD IN THE CASE CONTAINS NO EVIDENCE OF THAT PUBLICITY, DEFENSE COUNSEL NEITHER EXERCISED ALL OF HIS PEREMPTORY CHALLENGES NOR RENEWED HIS MOTION FOR CHANGE OF VENUE, AND THE COURT OF APPEALS RELIED UPON EXTRA-RECORD MATERIALS, NEVER PRESENTED TO THE STATE OR DISTRICT COURT 24

CONCLUSION 30

TABLE OF AUTHORITIES

Cases	*Page(s)*
Amadeo v. Zant, 486 U.S. 214 (1988)	28
Baldwin v. Alabama, 472 U.S. 372 (1985)	21
Boches v. State, 506 So.2d 254 (Miss. 1987)	16
Brugman v. State, 339 S.E.2d 244 (Ga. 1986)	16
Burden v. Zant, 498 U.S. ____, 111 S.Ct. 862, 112 L.Ed.2d 962 (1991)	22
Chandler v. Florida, 449 U.S. 560 (1981)	14, 28
Coleman v. Thompson, 500 U.S. ____ (June 24, 1991)	28, 30
Cupp v. Naughton, 414 U.S. 141 (1973)	14, 28
Estelle v. Williams, 425 U.S. 501 (1976)	10
Ex Parte Royall, 117 U.S. 241 (1886)	28
Fay v. Noia, 372 U.S. 391 (1963)	24
Globe Newspapers Co. v. Superior Court, 457 U.S. 596 (1982)	19
Holbrook v. Flynn, 475 U.S. 560 (1986)	*passim*
Irvin v. Dowd, 366 U.S. 717 (1961)	26
John Hancock Insurance Company v. Bartels, 308 U.S. 180 (1939)	20
Mu'Min v. Virginia, ____ U.S. ____, 111 S.Ct. 1899 (1991)	29
Murphy v. Florida, 421 U.S. 794 (1975)	25, 26

Cases *Page(s)*

Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 25

Norris v. Risley, 918 F.2d 828 (9th Cir. 1990) 18

Patton v. Yount, 467 U.S. 1025 (1984) 22, 27, 29

Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 16

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 16, 18, 19

Rideau v. Louisiana, 373 U.S. 723 (1963) 25

Rose v. Lundy, 455 U.S. 509 (1982) 28

Rushen v. Spain, 464 U.S. 114 (1983) 22

Sheppard v. Maxwell, 384 U.S. 333 (1986) 10, 17, 24, 25, 27

Smith v. Phillips, 455 U.S. 209 (1982) 14, 28

State v. McNaught, 713 P.2d 457 (Kan. 1986) 23

State v. Richey, 298 So.2d 879 (W.Va. 1982) 19, 20

State v. Rose, 548 S.2d 1058 (N.J. 1988) 17

Sumner v. Mata, 449 U.S. 591 (1981) 22

Taylor v. Louisiana, 419 U.S. 522 (1975) 29

Townsend v. Sain, 372 U.S. 293 (1963) 28

United States v. Alvarez, 755 F.2d 830 (11th Cir.), *cert. denied sub nom., Hernandez v. United States*, 474 U.S. 905 (1985) 17, 18, 26

Wainwright v. Witt, 469 U.S. 412 (1985) 22

Cases *Page(s)*

Willis v. Kemp, 838 F.2d 1510 (11th Cir. 1988) 20

Woods v. Dugger, 711 F.2d 586 (M.D. Fla. 1989) 2, 9, 12, 15, 22

Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991) . *passim*

Woods v. Florida, 479 U.S. 954 (1986) 9

Woods v. State, 490 So.2d 24 (Fla. 1986) 2, 8, 12, 22

Woods v. State, 531 So.2d 79 (Fla. 1988) 9

STATUTES AND CONSTITUTIONS

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 28

28 U.S.C. § 2254(d) 9, 21, 22

§ 921.141(5)(a), Fla.Stat. (1981) 7

§ 921.141(5)(g), Fla.Stat. (1981) 7

OTHER AUTHORITIES

Fed.R.Civ.P. 60(b)

Tate Rose, *What Life is Like in a Place Where Half the Residents are Behind Bars,* ***Chicago Tribune*** (October 25, 1985) 27

Stuart, *A Town's Fact of Life: The Death Row Prison,* ***New York Times*** (April 6, 1984) 27

Nordheimer, *Town Pays Little Mind to Executions,* ***New York Times*** (September 8, 1984) 27

CASE NO. _____

IN THE

Supreme Court of the United States

October Term, 1990

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

RONALD WOODS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, rendered on February 5, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 923 F.2d 1454 (11th Cir. 1991), and is reproduced in the Appendix to this pleading. [A6-A20].[1]

The opinion of the United States District Court for the Middle District of Florida is reported at 711 F.Supp. 586 (M.D. Fla. 1989), and is reproduced in the Appendix to this pleading [A21-A59].

The opinion of the Florida Supreme Court on direct appeal is reported at 490 So.2d 24 (Fla. 1986), and is likewise reproduced in the Appendix to this pleading [A60-A68].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on February 5, 1991. Petitioner's timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on May 3, 1991. Petitioner's timely Motion to Stay Mandate was denied by the lower court on May 15, 1991, and the judgment was rendered on such date. On May 21, 1991, however, this Court granted Petitioner's Application for Stay or Recall of Mandate, and directed that the Court of Appeals recall its mandate during the pendency of this proceeding. All three of these orders are reproduced in the Appendix to this pleading, and dated copies are likewise provided. [A1-A5].

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

---

1 [A _____] represents a citation to the materials contained in the Appendix to this pleading.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States of America are involved:

Amendment XIV, which provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VI, which provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment X, which provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Ronald Woods and his codefendant, Leonard Bean, were jointly charged by indictment with the first degree murder of John Dennard, a correctional officer, and the attempted murders of three other correctional officers, in regard to an incident which occurred on May 5, 1983, at Union Correctional Institution in Florida; at the time, Woods and Bean were inmates therein. Prior to trial, Woods' counsel moved to have all present employees of the Department of Corrections excused from the venire, and such motion was granted (R 70-72; 2537-2542). Defense counsel also moved for change of venue prior to trial, asking that the proceeding be moved due to, *inter alia,* the existence of pretrial publicity and the fact that the venire would, in all likelihood, have ties to the prison system; the state trial judge deferred ruling, stating that, if it appeared during voir dire that an impartial jury could not be selected, he would change venue (R 425-432, 1717-1718).

Jury selection formally commenced on September 26, 1983, and was completed that day. In order to seat a jury of fourteen (12 jurors and 2 alternates), it was only necessary for fifty-seven (57) prospective jurors to be examined. Of these fifty-seven, four were summarily excused before any inquiry was conducted as to their knowledge of the case or their ties to the correctional system. Of the fifty-three remaining, eighteen indicated no knowledge of the case, and eleven were not examined on this subject. Out of the remaining twenty-four who indicated some knowledge, only six were excused due to an inability to be impartial.[2] Of the fourteen jurors who sat, nine affirmatively indicated no

---

2 Defense counsel specifically questioned the venire as to their knowledge of a petition "in a convenience store concerning the situation of the guards"; of the fifty-three prospective jurors, only three indicated knowledge, and none of these sat on the jury (R 916-917, 1009, 1060).

knowledge of the case. As to the issue of ties to the correctional system, the record indicates that, of the fifty-three prospective jurors, three were not examined on this subject, and fourteen indicated no ties whatsoever. Of the thirty-six who indicated some ties to the correctional system, *i.e.*, those with friends or relatives employed therein, only six were excused on this basis. Of the fourteen who sat, seven had absolutely no ties. All of the prospective jurors, with the exception of those noted above, as well as all of the jurors who actually sat on Woods' jury, indicated that they could be impartial (R 912, 993-994, 1004-1005, 1049, 1054-1055). No doubt the ease with which the jury was selected explains defense counsel's failure to ever renew his motion for change of venue. Additionally, the record is clear that defense counsel did not use all of his peremptory challenges (SR 13).

Trial actually began the next day, and continued through September 30, 1983. At the commencement of the proceedings, Woods' counsel advised the court that his client was upset and intended to disrupt the proceedings; this assertion was corroborated by two correctional officers (R 1265-1271). The State then presented its case, and of its twenty-five witnesses, fourteen were correctional officers at the Union Correctional Institution and five were other correctional employees. These witnesses included eye witnesses who had actually observed the murder, as well as witnesses who testified as to Woods' statements before, during and after the incident, as well as his attempt to hide a knife afterwards. Codefendant Bean, in his case in chief, recalled three of these correctional officers. At the conclusion of all testimony on September 29, 1983, Woods' counsel asked the Court to admonish the jury to remain quiet during closing arguments the next day, stating,

> I would ask the Court *tomorrow* to admonish the audience not to react on closing arguments or make any comment, or that they should not

> comment on what is being said or react to what is being said in closing argument.

(R 2109) (emphasis supplied) [A70].[3]

The next morning, the judge announced that closing arguments were to be presented, and admonished the spectators to "remain in place quietly throughout the course of any argument", stating that he would "not tolerate any outbursts or emotional responses or audible responses through the proceedings today." (R 2135-2136) [A73]. At this point, defense counsel made the following motion:

> Your Honor, we would move to have a portion of the spectators cleared. The basis of the motion is that it is obvious that, en masse, the uniformed correctional officers have come to this trial. We would object to that, Your Honor, in that it impairs a fair and impartial trial of this cause.

(R 2136) [A73-A74].

Defense counsel contended that, by attending the trial in uniform, the officers were making "a communication to the jury", and requested a mistrial (R 2136-2138) [A73-A75]. The state trial court, who asked that a photographic record be made, denied the motion, finding:

> I don't know that I would analogize the gallery as being filled. I don't know what the count of the capacity of this courtroom is. I would imagine that it would approximate 80 to 90 persons in the seats, themselves.

---

3 Petitioner reproduces this portion of the transcript in the Appendix because such demonstrates, contrary to the findings of the Court of Appeals, that, in fact, no motion for mistrial or objection relating to the presence of any uniformed correctional officers was made at this point in time. *Cf. Woods*, 923 F.2d at 1459 [A17].

> There are, to the court's appearance, about an even or almost even division of custodial correctional officers uniformed people and people not so attired.
>
> There are certain correctional officers seated up beyond the rail, who have been the security personnel throughout the trial, and many of the uniformed persons in the courtroom, that I have observed, are persons who testified in their uniforms during the course of the trial.
>
> Your motion to exclude, based upon that, is denied.

(R 2138-2139) [A75-A76].

This entire colloquy is set forth in the Appendix to this pleading. [A72-A76].

At this point, closing arguments were presented, and, following instruction, the jury retired to deliberate. The jury subsequently convicted Woods on all counts charged. The jury, however, acquitted Bean of two of the counts of attempted murder. The penalty phase was held the next day, October 1, 1983. Following the presentation of testimony and argument, the jury, by a vote of 9 to 3, returned an advisory sentence of life imprisonment as to codefendant Bean, and, by a vote of 7 to 5, returned an advisory sentence of death as to Woods. The state sentencing judge imposed sentence in accordance with these recommendations, sentencing Bean to life and Woods to death. As to the latter sentence, the judge found the existence of two statutory aggravating circumstances — that the homicide had been committed by one with a prior conviction for a crime of violence, § 921.141(5)(a), Fla.Stat. (1981), and that it had been committed to hinder a governmental function, § 921.141(5)(g), Fla.Stat. (1981) — which were found to outweigh any finding in mitigation.

Woods appealed his convictions and sentence of death to the Supreme Court of Florida, raising, *inter alia,* a claim that he had been deprived of a fair trial due to the presence of the uniformed correctional officers. In its opinion rendered April 24, 1986, the Florida Supreme Court denied relief as to this claim. *Woods v. State,* 490 So.2d 24, 26-27 (Fla. 1986) [A63-A65]. The court found "no likelihood of prejudice or intimidation", sufficient to demonstrate an abuse of discretion in the trial court's failure to exclude the uniformed spectators. [A64]. The state court also made the following findings:

> Union is a small county. Given the number of prisons in the locality, uniformed correctional employees are a commonplace sight. Uniformed spectators caused no disruption, although they had apparently been present throughout this trial. On voir dire the prospective jurors indicated that they would follow the evidence and the law in their deliberations and would not be swayed by outside influences.

Id. [A64].

Woods also contended on appeal that his death sentence was disproportionate, because Bean had received a life sentence. The Florida Supreme Court rejected any contention that the two had been equally culpable,

> Witnesses testified that Woods, rather than Bean, was the homicide victim's prime attacker. Woods, not Bean, told the victim that he would die when the victim begged for his life. Woods, not Bean, held the office door shut to prevent other corrections officers from rescuing the victim. Finally, Woods stabbed a total of four guards, while Bean attacked only two.

Id. [A65].

This Court denied certiorari on November 10, 1986. *Woods v. Florida,* 479 U.S. 954 (1986).

Woods subsequently re-presented his claim for relief, involving the presence of the correctional officers, in a state post conviction motion filed in 1987. Both state courts found the claim procedurally barred, given the fact that it had been raised and rejected on direct appeal. *See Woods v. State,* 531 So.2d 79, 82 (Fla. 1988). Woods then filed a petition for writ of habeas corpus in the federal district court for the middle district of Florida, presenting thirteen (13) claims for relief, including that involving the presence of the correctional officers. Woods relied upon this Court's decision, *Holbrook v. Flynn,* 475 U.S. 560 (1986), and specifically contended that an evidentiary hearing was warranted.

The federal district court denied relief as to this claim; although the court did grant relief as to a claim involving the death sentence, such ruling was later reconsidered on Petitioner's motion filed pursuant to Fed.R.Civ.P. 60(b). As to the claim at issue, the court concluded that Woods was not entitled to relief under *Holbrook,* in that he had failed to demonstrate that the State had employed a practice which was "inherently prejudicial"; the district court found,

> Unlike *Holbrook,* the armed and uniformed persons present at the defendant's trial were not deployed by the court to maintain security, but attended the trial voluntarily as spectators.

Woods v. Dugger, 711 F.Supp. 586, 594 (M.D. Fla. 1989) [A27].

The district court found it highly probable that the jury would simply have concluded that the correctional officers were interested in the trial, as opposed to interested in intimidating them, and specifically credited, pursuant to 28 U.S.C. § 2254(d), those findings of fact made by the Florida

Supreme Court, to the effect that uniformed correctional employees were a "commonplace sight" in Union County. *Id.* [A26-A27].

Woods appealed this ruling to the United States Court of Appeals for the Eleventh Circuit, which, on February 5, 1991, rendered its opinion, reversing the district court. *Woods v. Dugger,* 923 F.2d 1454 (11th Cir. 1991) [A6-A20]. The court observed that it faced a situation "which was foreshadowed by dictum" from this Court's opinion in *Holbrook v. Flynn. Woods,* 923 F.2d at 1456 [A11]. The court likewise announced that, pursuant to this Court's decision, *Sheppard v. Maxwell,* 384 U.S. 333 (1986), it would consider whether, under the "totality of the circumstances", Woods had been denied a fair trial "in light of both pretrial publicity and occurrences taking place during the trial." *Id.* [A12]. The court found that Woods was entitled to relief because he had demonstrated "inherent prejudice"; the Court of Appeals specifically rejected the State's contention that actual prejudice was required under *Holbrook. Woods,* 923 F.2d at 1457, n.3 [A12]. The federal court of appeals concluded that the presence of the uniformed spectators had constituted an "impermissible factor coming into play", under *Estelle v. Williams,* 425 U.S. 501 (1976), which the State had failed to justify, and stated that the officers had "communicated a message" to the jury which they "could not help but receive", to the effect that they wished a conviction followed by a death sentence. *Woods,* 923 F.2d at 1459-1460 [A18]. The Court of Appeals found the presence of the officers particularly egregious, given the fact that the trial had been held "in the midst of an angry community." *Id.* [A17].

Petitioner's timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on May 3, 1991 [A4-A5], and its Motion to Stay Mandate was denied on May 15, 1991 [A2-A3]. On May 21, 1991, this Court granted Petitioner's

Motion for Stay and Recall of Mandate, and this Court ordered that the mandate and judgment of the Eleventh Circuit be recalled and stayed, during the pendency of this proceeding. [A1].

REASONS FOR GRANTING THE WRIT

I

WHETHER *HOLBROOK v. FLYNN,* 475 U.S. 560 (1986), AUTHORIZES THE HOLDING OF THE FEDERAL COURT OF APPEALS BELOW, TO THE EFFECT THAT THE MERE PRESENCE OF NON-DISRUPTIVE UNIFORMED SPECTATORS AT A STATE CRIMINAL PROCEEDING DEPRIVES THE DEFENDANT OF A FAIR TRIAL AND MANDATES THE GRANTING OF A WRIT OF HABEAS CORPUS AND THE DEFENDANT A NEW TRIAL

In the decision under review, *Woods v. Dugger,* 923 F.2d 1454 (11th Cir. 1991) [A6-A20], the federal court of appeals, in contrast to every other court which has reviewed this case, held that the presence of uniformed correctional guards in the spectator galleries during Respondent Woods' trial had *ipso facto* deprived him of a fair trial. There has never been any suggestion that the uniformed spectators were disruptive in any way, and, indeed, the Florida Supreme Court, on direct appeal, made an express finding to this effect, such finding credited by the federal district court, pursuant to 28 U.S.C. 2254(d). *See Woods v. State,* 490 So.2d 24, 27 (Fla. 1986), *Woods v. Dugger,* 711 F.Supp. 586, 594 (M.D. Fla. 1989) [A64, A26-A27]. The Eleventh Circuit Court of Appeals found, however, that the mere presence of spectators in uniform was so inherently prejudicial, that Woods' 1983 conviction and sentence of death had to be vacated, even in the absence of any showing of actual prejudice.[4] The court of appeals, relying upon what it perceived

---

4 The court of appeals apparently also believed that the presence of the spectators had been particularly egregious, given the pretrial publicity in this case. *Woods,* 923 F.2d at 1460 [A18-A19]. The Eleventh Circuit's discussion of pretrial publicity will be considered, *infra.*

to be *dictum* from this Court's opinion, *Holbrook v. Flynn,* 475 U.S. 560 (1986), harshly condemned the state of Florida for failing to justify the presence of these spectators, as in furtherance of "an essential state interest". *Woods,* 923 F.2d at 1460 [A19]. Petitioner respectfully contends that the Eleventh Circuit has entirely misconstrued this Court's *Holbrook* decision, and that the Constitution neither dictates the result reached in this case nor authorizes the Eleventh Circuit's promulgation of its new *per se* rule of reversal, to the effect that uniformed spectators are unable to attend state court criminal proceedings.

In *Holbrook v. Flynn,* this Court reversed the judgment of the federal court of appeals at issue, which had held that the deployment of four uniformed and armed state troopers, as security personnel, during a state court proceeding, had been so prejudicial as to deprive the defendant of a fair trial. This Court cautioned that, on federal habeas corpus, a federal court's role was limited to "look[ing] at the scene presented to the jurors" and determining "whether what they saw was so inherently prejudicial as to pose an unacceptable threat to [a] defendant's right to a fair trial"; if the challenged practice was not found to be inherently prejudicial, "and if the defendant failed to show actual prejudice, the inquiry is over." *Id.,* 475 U.S. at 572-573. This Court observed that society "has become inured to the presence of armed guards in most public places," and found that the security actually deployed at Flynn's trial had not been so inherently prejudicial as to deprive him of a fair trial. The *Holbrook* opinion also contains the following observation, "We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial," *id.,* 475 U.S. at 570-571, this latter observation seized upon by the court below as the linchpin for reversal. *Woods,* 923 F.2d at 1456 [A11].

The Eleventh Circuit's reliance upon *Holbrook* is puzzling, in a number of respects, as it is difficult to imagine two cases more dissimilar than *Woods* and *Holbrook*. In the latter precedent, this Court reiterated the narrow scope of review available to a federal court, when passing upon a petition for writ of habeas corpus filed by a state prisoner. *Id.*, 475 U.S. at 572-573. Thus, *Holbrook* is in conformity with the long line of precedents from this Court, which have recognized that federal courts possess no supervisory authority over state judicial proceedings and can only intervene to correct wrongs of constitutional dimension; before a federal court may overturn a conviction resulting from a state trial, the existence of a constitutional violation must be established, in that such ruling cannot merely be premised upon the federal court's belief that the State's action at issue was undesirable, erroneous or even "universally condemned". *See, e.g., Cupp v. Naughton,* 414 U.S. 141, 146 (1973); *Chandler v. Florida,* 449 U.S. 560, 570, 582-583 (1981); *Smith v. Phillips,* 455 U.S. 209, 221-222 (1982).

Indeed, this Court reversed the First Circuit in *Holbrook* precisely because that court of appeals had failed to conduct itself in conformity with the above well-established principles. Petitioner respectfully suggests that this Court should likewise grant certiorari and quash the opinion of the Eleventh Circuit at bar, inasmuch as that court has equally failed to heed the constraints of comity. Despite its reference to Woods' right to a fair trial under the Sixth Amendment, the federal court of appeals in this case essentially reversed Woods' conviction and sentence of death because the presence of the uniformed spectators somehow offended the sensibilities of the individual judges on the panel. Absolutely no precedent, state or federal, authorizes the Eleventh Circuit's finding of inherent or presumed prejudice under the circumstances *sub judice,* and the record in this case indicates an affirmative absence of actual prejudice.

This Court specifically held in *Holbrook* that the conspicuous or noticeable deployment of security personnel during a criminal proceeding was not the sort of "inherently prejudicial practice" that could only be permitted when justified by "an essential state interest", *Holbrook,* 475 U.S. at 569-570; as noted, however, this Court, also, *in dictum,* stated that it did not minimize the threat that a "roomful of armed and uniformed policemen," might pose to a defendant's right to a fair trial. The Eleventh Circuit apparently reasoned that, because this case can be said to involve a "roomful" or a "gallery full" of uniformed spectators,[5] *Holbrook* dictated that Woods' conviction had to be overturned. Nothing could be further from the truth. If, under *Holbrook,* the State need not justify every deployment of uniformed guards as security personnel, then Petitioner cannot see why the State must justify, under pain of reversal, the presence of uniformed officers who are simply spectators. The Eleventh Circuit specifically held that, at the time of defense counsel's objection, the uniformed correctional officers were "not part of the courtroom security", but were "present on their own time." *Woods,* 923 F.2d at 1460 [A19].[6] There has never been any suggestion that the prosecution intentionally "deployed" these officers to pack the security galleries during closing argument for any reason. Rather, the officers, as the federal district court found, were present because they were "interested in the trial", no doubt because it involved the murder of a co-worker. *Woods,* 711 F.Supp. at 594 [A27].

---

5 The state trial judge, when ruling upon defense counsel's objection to the presence of the uniformed correctional officers, observed that there were approximately eighty to ninety persons in the gallery and that there was "about an even division" of uniformed and non-uniformed spectators. [A75].

6 The state trial judge, however, when ruling upon defense counsel's objection, made a finding that, prior to that point in the proceedings, some of the uniformed officers had in fact "been the security personnel" during the trial. [A75].

Although the Eleventh Circuit, in a footnote, suggests that the officers' First Amendment rights were "not before it", *Woods,* 923 F.2d at 1459, n.10 [A18], the fact remains that this was a public trial, which the officers, like any other citizens, had at least *some* right to attend. *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 581 (1980) ("...absent an intervening interest articulated in findings, the trial of a criminal cause must be open to the public."); *Press-Enterprise Co. v. Superior Court,* 478 U.S. 1, 14-15 (1986) (while defendant's right to a fair trial is paramount, proceeding could only be closed if findings were made that a substantial probability existed that such right would be prejudiced unless closure was invoked, and no reasonable alternatives were available). It was apparently the view of the Eleventh Circuit that, by wearing their uniforms, the correctional officers somehow forfeited any right that they might have had to attend the trial and that, under this Court's precedents, the state trial judge had no alternative but to exclude them from the courtroom, upon defense counsel's motion. None of the above precedents supports that holding.

It is worth noting, although the Eleventh Circuit did not, that several state courts have passed upon the exact question presented in *Woods* — whether a defendant's right to a fair trial is violated by the attendance of uniformed police officers as spectators. Thus, in *Brugman v. State,* 339 S.E.2d 244 (Ga. 1986), the Georgia Supreme Court held that the defendant was not entitled to a new trial, following his conviction of trafficking in cocaine, due to the presence, in the audience, of several uniformed state drug agents, one with a semi-automatic rifle; the court rejected the defendant's contention that the agents had "intimidated" the jury by creating the impression of "an armed camp", and specifically found that their courtroom presence had not been "so inherently prejudicial as to require a new trial". *Id.,* 339 S.E.2d at 248. Similarly, in *Boches v. State,* 506 So.2d

254 (Miss. 1987), the Mississippi Supreme Court held that the trial court had not abused its discretion in failing to remove uniformed highway patrolmen present in the spectator galleries, during closing argument, upon the request of defense counsel; these patrolmen had previously been witnesses during the trial, and had remained in the courtroom to hear the arguments.[7] The court, applying this Court's decision, *Sheppard v. Maxwell,* 384 U.S. 333 (1966), found that, because the officers had not been disruptive in any way, the judge's decision to allow them to remain had not been error. Finally, in *State v. Rose,* 548 A.2d 1058 (N.J. 1988), the New Jersey Supreme Court ruled that the defendant, convicted of the murder of a police officer, had not been denied his right to a fair trial due to the presence of nine or ten uniformed police officers, colleagues of the murder victim, in the spectator galleries during closing argument. As in this case, the defendant had claimed that the officers by attending in uniform had intended to "send a message to the jury". *Rose,* 548 A.2d at 1104. The court relied upon this Court's *Holbrook* decision, in support of its ruling, and found that the lower court had not abused its discretion in failing to bar the officers.

Not only are the above state court decisions irreconcilable with *Woods,* thus providing a basis for certiorari review, but it is worth noting that the *Woods* opinion is contrary to Eleventh Circuit precedent as well. One of the cases relied upon by the New Jersey Supreme Court in *Rose,* was *United States v. Alvarez,* 755 F.2d 830 (11th Cir.), *cert. denied sub nom., Hernandez v. United States,* 474 U.S. 905 (1985). In that case, a different panel of the Eleventh Circuit held that, in a federal trial for the murder of an agent of the Bureau

---

7 The state trial judge in this case, in denying Woods' motion to exclude the officers, also made a finding that some of the spectators had previously been witnesses during the testimonial portion of the trial. [A75].

of Alcohol, Tobacco and Firearms (BATF), it had not been an abuse of discretion for the trial court to have allowed several uniformed BATF agents to remain in the courtroom during closing arguments. Alvarez, and his co-defendants, had asserted that the presence of these uniformed spectators had "created an atmosphere of retribution." *Id.*, 755 F.2d at 860. This panel of the Eleventh Circuit made short shrift of this argument, dismissing it as "wholly speculative", and stating that no showing had been made that the agents' presence had had any actual effect upon the jury. *Id.* This panel of the Eleventh Circuit also pointed out that Alvarez had presented no authority for the proposition that "spectators with a more than casual interest in the outcome of the trial cannot attend all phases of the trial," *id.* (footnote omitted), citing to this Court's opinion, *Richmond Newspapers, supra,* in support of its conclusion that it was "irrelevant that the agents may have been motivated by a desire for retribution." *Alvarez,* 755 F.2d at 860. The *Woods* court never mentions *Alvarez,* and the only conclusion that one can draw is that the Eleventh Circuit has promulgated one standard of review for federal prisoners and a different one for state habeas corpus petitioners; when identical claims for relief are presented, the federal petitioners cannot obtain relief without a showing of prejudice, whereas the state prisoners, literally, go free due to the court of appeals' "presumption". This result is intolerable under our federal system, and certiorari should be granted.

The Eleventh Circuit's reliance upon precedents involving spectators wearing buttons or arm bands designed to communicate a message to the jury is simply misplaced. *See, e.g., Norris v. Risley,* 918 F.2d 828 (9th Cir. 1990) (conviction of Montana rapist overturned, due to trial atmosphere caused by female spectators wearing large yellow buttons saying "Women Against Rape"; court found, *inter alia,* that buttons had interfered with Norris' rights to confront and cross examine witnesses, in that the buttons made an

"informal accusation".). The spectators in this case wore no buttons or armbands and carried no placards, and simply wore the uniforms that they were entitled to wear as part of their occupation. The fact that their appearance, in uniform, might have somehow reminded the jury of the victim has never been found as a basis for inherent prejudice.

In *State v. Richey,* 298 So.2d 879 (W.Va. 1982), the Supreme Court of West Virginia found no abuse of discretion in the trial court's refusal to exclude, upon motion of the defense, a group of spectators, consisting of high school students of the same age as the victim, in a rape prosecution. Citing to this Court's precedents, *Richmond Newspapers Inc., supra,* and *Globe Newspapers Co. v. Superior Court,* 457 U.S. 596 (1982), the court found that the defendant had failed to demonstrate that a clear likelihood existed that he would not receive a fair trial, due to the presence of spectators who, in light of their age, might have "psychologically influenced the jury against the defendant." *Richey,* 298 So.2d at 888. The court went on,

> The defendant's argument could be made as to the attendance of the general public since their presence could arguably demonstrate community hostility. Of more direct analogy would be the presence of females at a rape trial or the presence of the victim's family and relatives at any criminal trial. We must assume that a jury has the fortitude to withstand this type of public scrutiny, and cannot presume irreparable harm to the defendant's right to a fair trial by the presence of spectators

> who may have some type of associational identity with the victim of the crime.

Richey, 298 So.2d at 889.[8]

Certiorari should be granted due to this conflict, and it should also be noted that, once again, there is intra-circuit conflict as well.

In *Willis v. Kemp,* 838 F.2d 1510 (11th Cir. 1988), a different panel of the Eleventh Circuit held that the constitution had not been violated by the fact that the young son of a murder victim had attended the penalty phase of the defendant's trial as a spectator. The victim had been a police officer, and his son attended the proceedings, "dressed in a copy of a Ray City police uniform." *Willis,* 838 F.2d at 1523. This panel of the Eleventh Circuit noted that all citizens, including the family of a victim, had the right to attend a public proceeding, and further noted that the defendant had failed to cite any authority for the proposition that a defendant "has a constitutional right to have removed from the courtroom spectators whose presence may remind the jury of the victim." *Id.* Because the Eleventh Circuit's failure to follow, or even acknowledge, its own precedents in this area, has led to confusion and the unjust result below, certiorari should be granted. *Cf. John Hancock Insurance Company v. Bartels,* 308 U.S. 180, 181 (1939) (certiorari granted due to

---

8 In *State v. Franklin,* 327 S.E.2d 449 (W.Va. 1985), the West Virginia Supreme Court reached a different result, in a case in which twenty to thirty spectators, wearing bright yellow buttons saying "MADD" (Mothers Against Drunk Driving), conspicuously attended a trial for vehicular homicide. The court noted that the spectators had been led into the courtroom by the sheriff, suggesting state approbation of their message, and expressly stated that it found *Richey* distinguishable. *Franklin,* 327 S.E.2d at 455. The Florida Supreme Court, in denying relief as to this claim on direct appeal, noted *Franklin,* and relied upon *Richey. Woods,* 490 So.2d at 27 [A64-A65]. The Eleventh Circuit noted none of these cases.

intra-circuit conflict and importance of question presented). Certiorari review is, of course, also appropriate, given the irreconcilable conflict between the Eleventh Circuit's opinion and that of the state courts previously noted. *Cf. Baldwin v. Alabama,* 472 U.S. 372 (1985) (certiorari granted due to conflict between federal court of appeals and state supreme court).

Because the presence of the uniformed spectators was not "inherently prejudicial", the Eleventh Circuit should have required Woods to demonstrate actual prejudice, as this Court's *Holbrook* decision demands; indeed, such was the State's position below. *Woods*, 923 F.2d at 1457, n.3 [A12]. Petitioner respectfully suggests that, under the facts and circumstances of this case, Woods clearly could not, and cannot, make such showing, and, further, that the Eleventh Circuit might have appreciated this fact, had it not entirely failed to credit certain state court findings of fact, presumed correct under 28 U.S.C. § 2254(d). At the time that defense counsel objected in 1983, the state trial judge made certain findings. He specifically found that a number of the uniformed spectators had previously been witnesses or security personnel during the testimonial portion of the trial [A75]; nineteen correctional employees testified at this trial. The judge's findings are important, because they indicate that the jury would already have observed some of these uniformed correctional spectators performing other lawful duties during the course of the trial — *i.e.,* testifying or acting as security. Thus, there would be no basis for Woods' jury to have been intimidated or influenced by the presence of uniformed spectators in the spectator galleries, inasmuch as, to a large extent, they represented familiar faces. Further, it is a certainty that the sight of uniformed correctional officers was, to any Union County jury, no cause for comment or concern. The Florida Supreme Court, in denying relief as to this claim, made a specific finding to the effect that in Union County, where this case was tried, "uniformed

corrections employees are a commonplace sight", "given the number of prisons in that locality." *Woods,* 490 So.2d at 27 [A64]. While the federal district court, which denied relief as to this claim, specifically credited this finding of fact pursuant to 28 U.S.C. § 2254(d), *Woods,* 711 F.Supp. at 594 [A26-A27], the Eleventh Circuit, which, of course, granted relief and reversed the judgment of all three prior courts, does not even acknowledge this finding.

Petitioner respectfully suggests that the state court trial judge, who was actually present in 1983, was in the best position to know what occurred in his own courtroom, and that the Florida Supreme Court, which consistently reviews judgments entered in Union County, Florida, was in the best position to appreciate circumstances in that locale at the time of Woods' trial.[9] This Court has never hesitated to grant certiorari when, as here, a federal court of appeals, without explanation, has failed to credit findings of historical facts made by the state courts. *See, e.g., Burden v. Zant,* 498 U.S. ___, 111 S.Ct. 862, 112 L.Ed.2d 962 (1991); *Wainwright v. Witt,* 469 U.S. 412 (1985); *Patton v. Yount,* 467 U.S. 1025 (1984); *Rushen v. Spain,* 464 U.S. 114 (1983); *Sumner v. Mata,* 449 U.S. 591 (1981). No less is required here.

There is one final, though paramount, fact which should have precluded any finding of prejudice by the Eleventh Circuit; the federal district court, which denied relief, noted this fact. *Woods,* 711 F.Supp. at 589 [A48]. Ronald Woods was not the only defendant on trial before this jury. He was tried jointly with his co-defendant, Leonard Bean. While the

---

9 By way of contrast, the Eleventh Circuit's "knowledge" of Union County is apparently derived from its *de novo* research into articles from the ***New York Times*** and the ***Chicago Tribune,*** which were not published until years after the Woods trial, such articles completely outside the record. *Woods,* 923 F.2d at 1457-1458 [A13-A15]. It would be an understatement to describe the federal appellate court's fact finding methods as unprecedented. *See, infra.*

jury convicted Woods on all counts charged, the jury acquitted Bean of two counts of attempted murder [A22, A48]. While the jury, by a vote of 7 to 5, returned a sentence of death for Woods, the same jury, by a vote of 9 to 3, returned a life sentence recommendation for Bean [A23, A48]. The Florida Supreme Court, on direct appeal, made a specific finding that there had been no unconstitutional disparity between these results, in that the jury, on the basis of the evidence, could rationally have found Woods to be the more culpable. *Woods,* 490 So.2d at 27 [A65]. The Eleventh Circuit never acknowledges the disparate treatment of the co-defendants, no doubt because such is fatal to its holding. A jury which is basing its verdict upon emotion, as opposed to evidence, as the Eleventh Circuit believes that this jury was, does not discriminate between co-defendants. While the Eleventh Circuit opines that the correctional officers, by appearing in uniform, were "sending a message to the jury", which they "could not help but receive", to the effect that they "wanted a conviction followed by imposition of the death penalty", *Woods,* 923 F.2d at 1459-1460 [A18], the Eleventh Circuit never explains how, or why, this jury only received half the message. Surprisingly, there is precedent in this area. In *State v. McNaught,* 713 P.2d 457 (Kan. 1986), the Kansas Supreme Court, in finding that the presence of spectators wearing "MADD buttons" had not rendered the defendant's trial fundamentally unfair, specifically found that the jury "had not been prejudiced against the defendant", and had instead "carefully considered the evidence", due to the fact that the same jury had acquitted the defendant of several counts. *McNaught,* 713 P.2d at 468. Such should have been the result here, and Petitioner, on the basis of all of the above, respectfully moves this Honorable Court to grant certiorari and quash the opinion below.

II

WHETHER *SHEPPARD v. MAXWELL,* 384 U.S. 333 (1966), AUTHORIZES THE HOLDING OF THE FEDERAL COURT OF APPEALS BELOW, TO THE EFFECT THAT RELIEF CAN BE AFFORDED TO A STATE HABEAS PETITIONER, ON THE GROUNDS OF PRESUMPTIVELY PREJUDICIAL PRETRIAL PUBLICITY, WHEN THE RECORD IN THE CASE CONTAINS NO EVIDENCE OF THAT PUBLICITY, DEFENSE COUNSEL NEITHER EXERCISED ALL OF HIS PEREMPTORY CHALLENGES NOR RENEWED HIS MOTION FOR CHANGE OF VENUE, AND THE COURT OF APPEALS RELIED UPON EXTRA-RECORD MATERIALS, NEVER PRESENTED TO THE STATE OR DISTRICT COURT

The Court of Appeals would also seem to have awarded relief to Woods, based upon its belief that the prejudicial impact of the uniformed spectators was somehow exacerbated by the fact that this trial took place "in the midst of an angry community." *Woods,* 923 F.2d at 1459 [A17]. Taking very much to heart this Court's instruction in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), to the effect that the "totality of the circumstances" should be considered in resolving a Sixth Amendment claim, the Eleventh Circuit, literally, conducted its own research into conditions in Union County, Florida, and considered matters both inside and outside the record; in all respects, the federal court of appeals below became the "roving commission of inquiry", condemned by Justice Clark in his dissenting opinion in *Fay v. Noia,* 372 U.S. 391, 445-446, 469-470 (1963) (Clark, J., dissenting). Just as the Eleventh Circuit panel did not care for the presence of the uniformed spectators, the panel obviously felt that this case should have been tried outside of Union

County, and that all of those with the remotest tie to the state correctional system should somehow have been barred from the venire. None of this Court's precedents authorizes such holding, and, indeed, the record in this case is clear that Woods was only convicted after a trial before an impartial jury.

The Eleventh Circuit ostensibly considered this claim as one involving pretrial publicity, and concluded, once again, that prejudice would be presumed. *Woods,* 923 F.2d at 1459 [A17-A18]. This Court, of course, has previously held that the presumption of prejudice is rarely applicable, *see Nebraska Press Association v. Stuart,* 427 U.S. 539, 554 (1976), and, in such precedents, as *Rideau v. Louisiana,* 373 U.S. 723 (1963), *Sheppard v. Maxwell, supra,* and *Murphy v. Florida,* 421 U.S. 794 (1975), has set forth the factors which must exist before such finding can be made. Presumed prejudice can only exist where there has been "prejudicial, inflammatory publicity about the case" which has "so saturated the community" that an impartial jury cannot be selected; in addition to the existence of such publicity, a court must look to the "length to which the trial court must go in order to select jurors who appear to be impartial." *Murphy, supra.* As even the Eleventh Circuit's opinion makes plain, neither of these criteria was satisfied *sub judice,* and the federal court of appeals' granting of relief is entirely contrary to all of the above precedents.

As to the latter consideration, the ease or difficulty with which the jury was selected, the Eleventh Circuit noted that, of the forty-one jurors who did not sit, twenty-one had some knowledge of the case, whereas, of the fourteen jurors actually seated, only six did. *Woods,* 923 F.2d at 1458 [A15].

While Petitioner views the numbers somewhat differently,[10] even the Eleventh Circuit's statistics do not support a presumption of prejudice under *Murphy*. The jury in this case was selected with relative ease, in less than one day. Only fifty-seven veniremen had to be examined before a jury of fourteen (twelve jurors and two alternates) was selected. Defense counsel did not even use all of his peremptory challenges, and indeed indicated no dissatisfaction with the jury selected; although he had filed a pretrial motion for change of venue, upon which ruling was deferred, counsel never renewed such motion at trial. Presumed prejudice has never been found under these circumstances, nor would it be at all logical to expect that it would be. *Cf. Irvin v. Dowd,* 366 U.S. 717 (1961) (presumed prejudice found where ninety percent of venire had preconceived opinion that defendant was guilty and where three quarters of actual jury shared such feelings; jury selection lasted several days and involved examination of at least three hundred and seventy prospective jurors). It is again ironic to note that the Eleventh Circuit seeks to exercise greater "supervisory powers" over the state courts, than it does over the federal district courts within its circuit. In *United States v. Alvarez,* 755 F.2d 830, 859 (11th Cir.), *cert. denied sub nom. Hernandez v. United States,* 474 U.S. 905 (1985), a different panel of the Eleventh Circuit held, upon reviewing a federal conviction, that a defendant's failure to use all of his allotted peremptory challenges indicated "the absence of juror prejudice", and precluded any presumption of prejudice. Such should have been the result reached here, and Petitioner respectfully reiterates his contention that a federal court cannot, on habeas corpus, subject a state court conviction to

---

10 By the undersigned's reckoning, fifty-seven prospective jurors were examined before fourteen were ultimately selected. Only six of these fifty-seven were excused due to lack of impartiality based upon knowledge of the case, and of the jurors who actually sat, fully half had absolutely no knowledge of the case whatsoever.

a more rigorous standard of review than is employed on federal appeals. *Cf. Holbrook, supra.*

The Eleventh Circuit's handling of the issue of pretrial publicity *per se* is even more troubling. The record in this case contains absolutely no evidence of what the venire could have seen or heard about this case, an omission which obviously should have precluded the presumption of prejudice. The federal court of appeals, however, cites in its opinion a number of newspaper articles, including: Tate Rose, *What Life is Like in a Place Where Half the Residents Are Behind Bars,* ***Chicago Tribune,*** October 25, 1985; Stuart, *A Town's Fact of Life: The Death Row Prison,* ***New York Times,*** April 6, 1984; Nordheimer, *Town Pays Little Mind to Executions,* ***New York Times,*** September 8, 1984. *Woods,* 923 F.2d at 1457-1458 [A13-A14]. Inasmuch as these articles were plainly unavailable to the Union County, Florida, jury which convicted Woods in September of 1983, the Eleventh Circuit's reliance upon them, for any reason, is puzzling, to say the least. While it would, apparently, have been physically possible for the jury in this case to have viewed two other articles cited by the court below, attributed to United Press International on May 28, 1983, and June 23, 1983, *Woods,* 923 F.2d at 1458 [A14-A15], there is no indication that they actually did so, and, indeed, the Eleventh Circuit makes no such finding; additionally, under *Patton v. Yount,* 467 U.S. 1025, 1033-1035 (1984), it would appear significant that these articles were published three months prior to the trial. Accordingly, it cannot be said that the record *sub judice* would support any finding that the community in this case was "saturated" with "pretrial, inflammatory publicity about this case", such that a mandatory presumption of prejudice was warranted. *Cf. Sheppard v. Maxwell, supra* (presumed prejudice found where, over a period of months, county bombarded with incessant inflammatory prejudicial publicity concerning offense and defendant).

Inasmuch as there has been no showing that the jury in this case was exposed to the articles above, the question then becomes why the court of appeals cited them. The rather shocking answer would seem to be that the Eleventh Circuit believed that, in ruling upon a state prisoner's petition for writ of habeas corpus, it was somehow authorized to substitute its judgment for that of the actual venire in this case. In other words, the court of appeals conducted its own investigation into what conditions in Union County might have been at the time of Woods' trial, and, not liking what it found, ordered the granting of the writ. Petitioner must vehemently contend that nothing in 28 U.S.C. § 2254, nor in any of this Court's precedents, *cf. Cupp v. Naughton, supra; Chandler v. Florida, supra; Smith v. Phillips, supra,* authorizes such action by a federal court of appeals. If the record was at all undeveloped as to the atmosphere in which Woods' trial was conducted, the court of appeals should have remanded for an evidentiary hearing, under *Townsend v. Sain,* 372 U.S. 293 (1963). The court of appeals reversed the judgment of the district court based upon matters which that court had never seen, a flagrant violation of this Court's holding in *Amadeo v. Zant,* 486 U.S. 214 (1988). Likewise, the court of appeals, in effect, reversed the judgments of the state courts in this case, based upon matters which they had had no chance to consider, in total derogation of the well-considered doctrine of comity. *See, e.g., Rose v. Lundy,* 455 U.S. 509, 518 (1982) (noting 'it would be unseemly in our dual system of government for a federal [ ] court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation', quoting *Ex Parte Royall,* 117 U.S. 241, 251 (1886)); *Coleman v. Thompson,* 500 U.S. ____ (June 24, 1991).

It would appear the Eleventh Circuit was also concerned about the fact that many of the prospective jurors in this case had ties to the correctional system; the court of appeals observed that, of the forty-one jurors who were excused,

BEST AVAILABLE COPY

thirty-three had ties to the prison system, as did eight of the fourteen sat. *Woods,* 923 F.2d at 1458 [A15].[11] While the court of appeals apparently believes that these persons, due to the occupation of their family or friends, should somehow have been *per se* disqualified from jury service in this, or any comparable, case, there is, of course, nothing in the Constitution which would authorize such startling result. This Court's precedents, rather, would seem to hold that the blanket exclusion from jury service of an entire class of persons violates the Sixth Amendment, *see, e.g., Taylor v. Louisiana,* 419 U.S. 522 (1975), and the individuals at issue in this case would, as citizens, presumably have some right to sit on a jury. What Woods was entitled to was a trial before an impartial jury, and there is nothing in this record to suggest that that is not exactly what he received. The vast majority of all of the prospective jurors stated that they could be impartial, and decide the case based upon the evidence, as did, most importantly, all of the jurors who actually served. It would not appear, under this Court's precedents, *Patton v. Yount, supra,* and *Mu'Min v. Virginia,* ___ U.S. ___, 111 S.Ct. 1899 (1991), that more was required. Certainly, the assurances given by the jurors satisfied Woods' trial attorney, in that he neither renewed his motion for change of venue nor felt compelled to use all of his allotted challenges. The fact that the Eleventh Circuit, as a result of its extra-record research, apparently would have employed a different strategy is not of constitutional significance. For this, and all of the above reasons, this Court should grant certiorari and quash the opinion below.

---

11 By the undersigned's reckoning, however, only six, out of fifty-seven prospective jurors, were excused due to any inability to be impartial stemming from ties to the prison system; additionally, petitioner would contend that fully half of the actual jury had no ties whatsoever.

CONCLUSION

Like *Coleman v. Thompson, supra,* "this is a case about federalism", and concerns the respect that the federal courts owe the states. Unlike *Coleman,* however, this case does not arise from a federal court of appeals which has "respected" a state court's judicial system. Rather, this case arises from a federal court of appeals which has promulgated its own rules of law, and which subsequently punishes the state courts for failing to anticipate these unprecedented holdings. In reaching the result below, the court of appeals has entirely failed to heed the constraints of comity, and has announced new *per se* rules which it declines to apply, under identical circumstances, in federal appeals. This Court should grant certiorari, and quash the opinion below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

RICHARD B. MARTELL
Assistant Attorney General
Florida Bar No. 300179

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CASE NO. _____

IN THE

Supreme Court of the United States

October Term, 1990

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Petitioner,

v.

RONALD WOODS,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ROBERT A. BUTTERWORTH
Attorney General

RICHARD B. MARTELL
Assistant Attorney General
Florida Bar No. 300179

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

INDEX TO APPENDIX

Document *Page(s)*

Order of the United States Supreme Court Granting Singletary's Motion for Stay and Recall of Mandate May 21, 1991 . . . . . A-1

Order of United States Court of Appeals-Eleventh Circuit Denying Singletary's Motion for Stay of Mandate May 15, 1991 . . . . . A-2

Order of United States Court of Appeals-Eleventh Circuit Denying Singletary's Motion for Rehearing May 3, 1991 . . . . . A-4

Opinion of United States Court of Appeals-Eleventh Circuit, *Woods v. Dugger,* 923 F.2d 1454 (11th Cir. 1991) A-6

Opinion of United States District Court-Middle District of Florida, *Woods v. Dugger,* 711 F.Supp. 586 (M.D. Fla. 1991) A-21

Opinion of Supreme Court of Florida on Woods' Direct Appeal, *Woods v. State,* 490 So.2d 24 (Fla. 1986) A-60

Excerpt of Proceedings, *State v. Woods,* Eighth Judicial Circuit, Case No. 83-81 CA, September 29, 1983, at pages 2109-2110 . . . . A-69

Excerpt of Proceedings, *State v. Woods,* Eighth Judicial Circuit, Case No. 83-81 CA, September 30, 1983, at pages 2135-2139 . . . . A-72

Supreme Court of the United States

No. A-880

HARRY K. SINGLETARY, JR., Secretary,
Florida Department of Corrections,
Applicant,

v.

RONALD WOODS

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Eleventh Circuit, case No. 89-3420, be, and the same is hereby, recalled and stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 21st day of May, 1991.

A true copy WILLIAM K. SUTER
Test:
Clerk of the Supreme Court of the United States
By Christopher Vasil
Deputy

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-3420

RONALD WOODS,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

(XX) The motion of *appellee, Richard L. Dugger* for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of *appellee, Richard L. Dugger* for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

Frank M. Johnson
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-3420

RONALD WOODS,

Petitioner-Appellant,

versus

RICHARD L. DUGGER,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion February 5, 1991, 11th Cir., 1991, ____ F.2d ____).

Before: KRAVITCH, JOHNSON and CLARK, Circuit Judges.

PER CURIAM:

(XX) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in

regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Frank M. Johnson
UNITED STATES CIRCUIT JUDGE

Ronald WOODS, Petitioner-Appellant,

v.

Richard L. DUGGER,
Respondent-Appellee.

No. 89-3420

United States Court of Appeals, Eleventh Circuit

Feb. 5, 1991

Petitioner, whose first-degree murder conviction and death sentence were affirmed by the Florida Supreme Court, 490 So.2d 24, filed petition for habeas corpus relief. The United States District Court for the Middle District of Florida, 711 F.Supp. 586, No. 88-00910-CIV J-14, Susan H. Black, Chief Judge, originally granted petition in part, but, after remand for resentencing resulting in another death sentence, denied petition. Petitioner appealed. The Court of Appeals, Johnson, Circuit Judge, held that hostile atmosphere in small rural community in which petitioner's trial took place, for killing of prison guard, and number of prison guards who attended trial in full uniform deprived defendant of fair trial.

Reversed and remanded with instructions.

Billy H. Nolas, Larry H. Spalding, Office of the Capital Collateral Representative, Tallahassee, Fla., for petitioner-appellant.

Richard B. Martell, Dept. of Legal Affairs, Tallahassee, Fla., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH, JOHNSON and CLARK, Circuit Judges.

JOHNSON, Circuit Judge:

This case is an appeal from the district court's denial of Ronald Woods' petition for a writ of habeas corpus.

I. FACTUAL BACKGROUND

This case arose out of a disturbance at the Union Correctional Institution in Union County, Florida on May 5, 1983. Woods and his co-defendant, Leonard Bean, attacked a number of correctional officers at the prison, including John Dennard. Woods, who was eighteen at the time, stabbed and killed Dennard.

Trial

On June 7, 1983, Woods and Bean were indicted for first degree murder. The joint trial began on September 26, 1983. On September 30, 1983, the jury returned guilty verdicts against both Woods and Bean.[1] On October 1, 1983, the trial court conducted an advisory sentencing proceeding. Woods presented the testimony of a court appointed psychologist, Dr. Harry Krop, that Woods had an I.Q. of 69 which placed him in the mild range of mental retardation. The jury voted seven to five that Woods should receive the death penalty.

---

1 The jury convicted Woods on all five counts. Bean was sentenced to life imprisonment.

The trial court then sentenced Woods to death. The judge found two statutory aggravating circumstances: Woods committed the murder while incarcerated, and the crime impeded the operation of the correctional system. *See* Fla.Stat.Ann. § 921.141(5)(a) and (g). The trial judge found one statutory mitigating circumstance: Woods' age. *See id.* at (6)(g). The judge rejected Woods' argument that Woods did not have the mental capacity to appreciate the criminality of his conduct or to restrict his actions to the requirements of law. *See id.* at (6)(f).

Appeals and Collateral Attacks

Woods appealed his conviction and sentence directly to the Florida Supreme Court, which affirmed the trial court. *Woods v. State,* 490 So.2d 24 (Fla.1986). On November 10, 1986, the United States Supreme Court denied certiorari in the direct appeal. *Woods v. Florida,* 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986). On October 5, 1987, the Governor of Florida signed a death warrant to be carried out on December 10, 1987.

On November 6, 1987, Woods filed a motion in the trial court for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The trial court denied the motion on December 1, 1987. On December 9, 1987, the Florida Supreme Court stayed the execution of the death warrant. On July 14, 1988, however, the court affirmed the lower court and dissolved the stay. On October 17, 1988, the Governor signed a second death warrant, scheduling execution for the week of November 10, 1988. *Woods v. State,* 531 So.2d 79 (Fla.1988).

Woods filed the present action, his first federal habeas corpus petition, on November 2, 1988.[2] The district court

---

2 The petition presents 13 claims for relief:

(1) that the trial court's failure to remove the large number of uniformed correctional officers from the courtroom violated the Sixth, Eighth, and Fourteenth Amendments;
(2) that the exclusion of black jurors violated the Eighth and Fourteenth Amendments;
(3) that the trial court's refusal to continue the case violated the Sixth, Eighth, and Fourteenth Amendments;
(4) that the trial court's refusal to continue the case in order to allow a pre-penalty-phase investigation and trial counsel's failure to discover crucial mitigating evidence violated the Sixth, Eighth, and Fourteenth Amendments and Woods's right to a competent mental health evaluation under the Fourteenth Amendment;
(5) that execution of an eighteen-year-old with the mental age of a twelve-year-old violates the Eighth Amendment;
(6) that the trial court erred in instructing the jury that it must consider Woods's mental problems as aggravating circumstances;
(7) that the trial transcript was unreliable, violating the Sixth, Eighth, and Fourteenth Amendments;
(8) that the trial court failed to consider Woods's mental deficiencies as non-statutory mitigating circumstances in violation of the Sixth, Eighth, and Fourteenth Amendments;
(9) that the prosecution improperly urged the jury and the trial judge to consider the victim's close relationship with the prosecutor and the trial judge;
(10) that the prosecutor's references to Woods's decision not to present evidence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments;
(11) that the trial court improperly lessened the jury's sense of responsibility during the penalty phase of the trial, violating the Eighth and Fourteenth Amendments;
(12) that trial counsel was incompetent in failing to argue for severance on the ground that Bean's lawyer had a conflict of interest;
(13) that the trial court improperly considered Woods's juvenile offenses and prison disciplinary reports as aggravating circumstances in violation of the Sixth, Eighth, and Fourteenth Amendments.

Woods v. Dugger, 711 F.Supp. 586, 591-92 n. 8 (M.D. Fla.1989).

stayed execution of the death warrant in order to consider the petition and allow an appeal to this Court. The district court denied Woods' request for an evidentiary hearing on the petition, but on December 20, 1988, held oral argument. The district court rejected all of Woods' claims, except the claim that the trial court failed to consider nonstatutory mitigating evidence in violation of *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1986). The district court granted the petition on the *Hitchcock* claim, ordering the trial court to resentence Woods within 180 days and to take into account all mitigating evidence as well as the jury's recommendation of death. 711 F.Supp. 586.

Both Woods and the state appealed to this Court. The state, however, did not seek a stay of the district court's order pending appeal. Instead, the state arranged for the trial court to resentence Woods on April 23, 1989. The trial court considered evidence dating back to the crime and evidence that had come to light after the prior sentence. Finding that the two statutory aggravating circumstances (crime committed while in prison, and crime inhibiting operation of prison) outweighed the one statutory mitigating circumstance (youth) and the nonstatutory mitigating circumstances, the trial court again sentenced Woods to death. This Court then dismissed the state's cross-appeal as moot in light of the new sentence.

On May 24, 1990, the state filed a motion with this Court to relinquish jurisdiction so that the district court could amend its judgment under Fed.R.Civ.P. 60(b) in order to take into account the new sentence. The Court granted the motion on June 5, 1990. On July 13, 1990, the district court amended its prior judgment and denied Woods' petition on all claims. This appeal is from that judgment.

II. ANALYSIS

In this appeal, Woods alleges that he was denied a fair trial due to the hostile atmosphere in the small rural community in which the trial took place and to the number of prison guards who attended the trial in full uniform. In this case we face a situation which was foreshadowed by dictum from the Supreme Court in *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). The *Holbrook* Court held that some courtroom security did not violate the defendant's Sixth Amendment right to receive a fair trial. However, the Court wrote, "[w]e do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial." *Id.* at 570, 106 S.Ct. at 1346.

The due process clause of the Fourteenth Amendment guarantees the right of state criminal defendants to be tried by an impartial jury. The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based upon the evidence developed at the trial." *Irvin v. Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961) (citations omitted). As Chief Justice Warren noted in his concurrence in *Estes v. Texas,* 381 U.S. 532, 552, 85 S.Ct. 1628, 1637, 14 L.Ed.2d 543 (1965) (Warren, C.J., concurring) due process requires the courts to safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." *Id.* at 560, 85 S.Ct. at 1641. Specifically, the courts must guard against "the atmosphere in and around the courtroom [becoming] so hostile as to interfere with the trial process, even though... all the forms of trial conformed to the requirements of law...." *Id.* at 561, 85 S.Ct. at 1642.

There have been several cases in this Court, as well as in the Supreme Court, where criminal defendants have raised

the issue of being denied a fair trial due to various incidents harming the "trial process" of which Chief Justice Warren spoke in *Estes v. Texas. Id.* at 560, 85 S.Ct. at 1641. While some of the cases have focused on questionable security precautions during the trial, *see, e.g., Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340; *Elledge v. Dugger,* 823 F.2d 1439 (11th Cir.), *modified in part by* 833 F.2d 250 (11th Cir.1987), and other cases have focused on pretrial publicity, *see, e.g., Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Coleman v. Kemp,* 778 F.2d 1487 (11th Cir.1985), we decline to artificially divide these cases into two separate lines of analysis. Instead we follow the command of the Supreme Court in *Sheppard v. Maxwell* and examine the "totality of circumstances," *Sheppard,* 384 U.S. at 352, 86 S.Ct. at 1517. Therefore, we evaluate the fairness of Woods' trial in light of both pretrial publicity and occurrences taking place during the trial.

In order for Woods to prevail on his claim of being denied a fair trial he must show either actual or inherent prejudice.[3] *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986); *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The test for inherent prejudice is "not whether jurors actually articulated a consciousness

---

3 The state claims that *Holbrook v. Flynn* requires the petitioner to prove both actual and inherent prejudice. The state points to the Court's statement that "if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Flynn,* 475 U.S. at 572, 106 S.Ct. at 1347-48. We decline to follow the state's approach. First, such a reading would be a dramatic change in the law as initially set out in *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), and we decline to infer such a *sub silentio* change. Second, such a reading makes little sense. If the petitioner can prove actual prejudice nothing is gained by making him also prove inherent prejudice. We also note that the Ninth Circuit has recently interpreted *Flynn* to allow the petitioner to prove either actual or inherent prejudice. *See Norris v. Risley,* 918 F.2d 828 (9th Cir.1990).

of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook v. Flynn,* 475 U.S. at 570, 106 S.Ct. at 1346 (quoting *Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)). This test requires us to examine two factors: first, whether there is an "impermissible factor coming into play" and second, whether it poses an "unacceptable risk." The Ninth Circuit has found one example of an impermissible factor. In *Norris v. Risley,* 918 F.2d 828 (9th Cir.1990), the court determined that spectators at a kidnapping and rape trial who were wearing buttons inscribed with the words "women against rape" posed an impermissible factor, "[b]ecause the buttons...conveyed an implied message [of guilt], and because the buttons were not subject to the constitutional safeguards of confrontation and cross examination, they are clearly the sort of 'impermissible factors' that courts must ensure receive no weight." *Id.* at 830.

We must also examine the record to determine if these impermissible factors posed an "unacceptable risk." The *Williams* Court held that a risk becomes unacceptable when there is a "probability of deleterious effects." *Williams,* 425 U.S. at 504, 96 S.Ct. at 1693. Should Woods be able to prove actual or inherent prejudice due to the presence of the uniformed prison guards then the state must justify their presence with an "essential state interest specific to [the] trial." *Holbrook,* 475 U.S. at 569, 106 S.Ct. at 1346.[4]

Turning to the record, we note that the trial was held in Union County, Florida. Union County is a small rural county in Northern Florida. Just over ten thousand people live in Union County, but one-third of those are prisoners. Tate Rose, *What Life is Like in a Place Where Half the Residents*

---

4 There is no similar justification which would rebut allegations of pretrial publicity. *See Sheppard v. Maxwell, supra.*

are Behind Bars, Chicago Tribune, October 21, 1985, at Tempo Sect. p. 1, col. C. In the neighboring counties of Bradford and Union there are four state prisons which employ twenty-two hundred workers, and the prisons are responsible for $71 million of the local economy. Stuart, *A Town's Fact of Life: The Death Row Prison,* New York Times, April 6, 1984 at Sect. A, p. 14, col. 1. The Florida Statistical Abstract also reports that Union County is one hundred percent rural, *Florida Statistical Abstract* 3 n. 2, 13 (Shermyen, ed. 1989), and that thirty-two hundred people are employed outside of the home. *Id.* at 171.

The jury was drawn exclusively from Union County. Richard Dugger, the State Secretary of Corrections, told the *New York Times,* in a reference to the town of Starke in neighboring Bradford County, "The only time the community takes note of what's going on at the prison...is when a guard is killed." Nordheimer, "Town Pays Little Mind to Executions," *New York Times,* Sept. 8, 1984, at Sect. 1, p. 6, col. 3.

Union County took note of the murder of Corrections Officer Dennard. Prior to his death, he was interviewed by the *St. Petersburg Times.* He told the paper that the Union Correctional Institution was dangerously understaffed and that he wanted to be transferred because he feared for his safety as a prison guard. Officer Dennard's death became a focal point for the lobbying efforts of a group called the United Correctional Employees in their demands for the government to hire more correctional officers. *United Press International,* June 23, 1983. After Officer Dennard's death, his sister began a petition that she reported was "going like hot cakes" and had gathered hundreds of signatures. *United Press International,* May 28, 1983. By the time of Mr. Woods' trial, defense counsel told the court that the petition had 5,000 signatures, not all of which, however, were from Union County residents. The petition stated "its [sic] time we started punishing the guilty and protecting the innocent"

and demanded the death penalty for those who kill prison guards. *Id.*

The effect of the killing on this community is evidenced in the answers obtained on voir dire.[5] Of the forty-one potential jurors excused either peremptorily or for cause, six immediately excused themselves. Consequently, the record reveals no information about these six. Of the remaining thirty-five potential jurors who were eventually excused: thirty-three had relatives or close friends who worked in the prison, or the jurors had worked in the prison themselves; twenty-one of the excused jurors had heard of the case; nine knew a witness; and one was a witness who was not called by either side. Within the actual jury: four jurors and one alternate juror neither had heard of the case nor had any relatives working in the prison system; four jurors had not heard of the case, but had either worked in the prison system themselves or had relatives currently working in the system; three jurors and one alternate juror both had heard of the case and had relatives currently working in the system; and, finally, one juror had heard of the case but had no relatives or friends working in the system.[6]

In addition, the gallery of the courtroom was filled with spectators. The defense counsel raised several objections to the presence of prison guards in the gallery, and the court ordered a videotape and photographs taken of the gallery. The photos reveal that the gallery had four rows which could each seat about ten or eleven people. Virtually every seat was occupied, and several people were standing in the back

---

5 First, it should be noted that current prison employees were excluded from the potential venire.

6 As a side note, an example of how small the county was, the jury contained one juror who was the mother of another juror and a juror who knew the husband of another juror.

of the courtroom. About half of the spectators appear to be wearing prison guard uniforms.[7]

The state attempts to downplay the significance of the spectators in two ways. The state argues: (1) most of the officers in the gallery were witnesses who testified in uniform at trial, and (2) the officers were present only during closing arguments.

The state's first argument is not factually supported. The state is correct in noting that fourteen corrections officers testified at trial. And, the state is correct in that the trial court noted just before closing argument that "many of the uniformed persons in the courtroom, that I have observed, are persons who testified in their uniform during the course of the trial." The court's comment can be true only about the gallery during closing arguments. We must infer from the record that there was a substantial number of non-witnesses present in uniform prior to closing arguments because at the close of evidence, the day before closing argument, the defendant moved for a mistrial on the basis of the large number of officers in the audience. At this point, none of the witnesses were present in the gallery because the rule of sequestration had been invoked at the start of the trial and the state explicitly maintained the rule for all its witnesses up until closing arguments. Moreover, the fact that the witnesses testified in uniform at trial[8] does not lessen the prejudice of their showing up in uniform to hear

---

7 Woods also alleges, and the state has not denied, that there was excessive security utilized as a show of force at the trial. Woods claims that there were guards with shotguns on the courthouse roof, on the courthouse steps and in the courthouse lobby. Woods claims that the jurors had to walk through this fortress-like atmosphere every day. While these allegations may or may not be true, we do not rely on them to reach our conclusion.

8 Evidence was taken only on Tuesday, Wednesday, and Thursday.

closing arguments at a later time.[9] The prejudice does not depend on whether the uniformed guards were witnesses or not. The prejudice arises from the presence of the uniformed corrections officers in the context of a trial being held in the midst of an angry community.

The state makes the additional claim that the audience was present only during closing arguments. By examining the record, it is clear that uniformed guards were present in the gallery at the very least during voir dire, closing argument, and throughout the sentencing phase of the trial. The record is replete during those portions of the trial judge's comments to the spectators telling them when the trial will resume following breaks and requesting them to be in their seats before the jury returns. The trial judge also at times admonished the crowd to remain quiet and not make audible responses. Furthermore, the judge told the spectators to go to the lobby while the jury deliberated during the guilt phase. The record also reflects that spectators, including the uniformed guards, were present during the trial, despite the lack of admonitions from the bench, because the closing arguments were not made until Friday morning, yet the defense counsel made their objection and moved for a mistrial at the close of all the evidence on Thursday evening.

This Court has in the past noted that presumed prejudice rarely occurs and "is reserved for extreme situations." *Bundy v. Dugger,* 850 F.2d 1402 (11th Cir.1988). The case at hand is one of those "extreme" cases. While the pretrial publicity may not be sufficient to rise to the level where we can presume prejudice to Mr. Woods, the publicity must be viewed in the context of the complete trial. Unlike the trial disputed in *Bundy,* Woods' trial was marred by the presence of uniformed spectators in the courtroom as well as by the

---

9 Closing arguments were heard on Friday.

pretrial publicity. Viewing the totality of the circumstances, we have no choice but to conclude that there was "an unacceptable risk [of] impermissible factors coming into play." *Holbrook v. Flynn,* 475 U.S. at 570, 106 S.Ct. at 1346.

The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury.[10] The message of the officers is clear in light of the extensive pretrial publicity. The officers wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message.

It is the purpose of the Sixth Amendment to guarantee the defendant a fair trial in which the jury reaches its verdict based only on the evidence subjected to the crucible of the adversarial process.[11] While this Court realizes that no trial can be perfect, some errors so prejudice the process that reviewing courts are unable to conclude that the verdict was based only on the evidence presented. Faced with such an error, we hold that the record demonstrates that the pretrial publicity combined with the large number of uniformed

---

10 It is a mistake, however, to weigh the First Amendment speech rights of the officers against the Sixth Amendment rights of Mr. Woods, for that case is not before this Court. We express no opinion on whether the trial court may muzzle the free speech of the officers. We only hold that if the officers choose to speak in the manner that they chose-the Sixth Amendment rights of Mr. Woods are violated.

11 The Sixth Amendment imposes an obligation upon trial courts to minimize any risk of "unacceptable factors" affecting the accused's right to have a fair trial. This obligation is clearly distinct from any trial court authority that is derived from state statutes, *see, e.g., Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), or from the courts' inherent contempt power. *See, e.g., In Re Little,* 404 U.S. 553, 92 S.Ct. 659, 30 L.Ed.2d 708 (1972) (per curiam). As should be clear from the facts of this case, the actions of the spectators and the effect of the pretrial publicity deprived Woods of his Sixth Amendment right to a fair trial, yet no one alleges that it amounted to contemptible conduct.

spectators rose to the level of inherent prejudice, thereby depriving the petitioner of a fair trial.[12]

The Supreme Court in *Holbrook v. Flynn* held that after a showing of prejudice resulting from the presence of uniformed officers, the state may rebut the showing with a showing that the officers furthered an "essential state interest." 475 U.S. at 568-69, 106 S.Ct. at 1346. The state in the present case does not, and cannot, justify the presence of the uniformed corrections officers. The corrections officers were not present to escort any prisoners and they were not part of the courtroom security. Moreover, all testimony was concluded the day before oral arguments; therefore the officers were present on their own time and not as witnesses. Section III.C. of the Department of Corrections Policy and Procedure Directive regarding employees uniforms and clothing states that "the uniform...is not to be worn during off-duty hours or when the employee is not acting in an official capacity, except when traveling to and from work." Under department rules, therefore, no state interest can justify the uniformed presence of these off-duty correctional officers.

The state, however, argues that the evidence of guilt is so overwhelming that any error was harmless. This argument was foreclosed by this Court's holding in *Coleman v. Kemp,* 778 F.2d at 1541 in which we held that a denial of a fair trial can never be harmless because the right is so fundamental to our notion of due process. The Supreme Court recently wrote that "[s]ome constitutional violations . . . by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered

---

12 We do not mean to imply that presumed prejudice can occur only when there is a combination of courtroom demonstrations and pretrial publicity.

harmless." *Satterwhite v. Texas,* 486 U.S. 249, 256, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988). We hold that harmless error analysis is inapplicable to a claim of a denial of a fair trial.

III. CONCLUSION

The petitioner also raises an ineffective assistance of counsel claim and an erroneous denial of a continuance claim, both of which appear to merit evidentiary hearings in the district court. However, in order to avoid issuing an advisory opinion we will not reach these questions. The record in this case is sufficient to demonstrate that the defendant was denied a fair trial. There is no need for an evidentiary hearing in the district court on this claim.[13] We conclude that petitioner Woods has met the extremely high standard necessary for a successful claim of presumed prejudice. We therefore REVERSE the decision of the district court and REMAND the case to the district court with instructions to issue the writ of habeas corpus conditioned on the state's right to retry the petitioner within a reasonable time.[14]

---

13 The record is clear that the officers were in the gallery for extended periods during the trial. The state has not contested any of the underlying facts upon which we rely. It, therefore, is clear that a remand for an evidentiary hearing would be a waste of judicial resources.

14 This Court notes that a resentencing hearing was held on April 23, 1989. The record of this hearing reflects that the gallery of the courthouse was once again filled with a large group of uniformed corrections officers. A change of venue would eliminate or at least minimize this problem.

Ronald WOODS, Petitioner,

v.

Richard DUGGER, Secretary, Florida Department of Corrections, Respondent.

No. 88-910-Civ-J-14.

United States District Court,
M.D. Florida,
Jacksonville Division.

Feb. 21, 1989.

On Motion to Alter or Amend Judgment
April 14, 1989.

Defendant was convicted of first-degree murder and other offenses, and sentenced to death, in the Circuit Court, Union County, R.A. Green, J., and defendant appealed. The Florida Supreme Court, 490 So.2d 24, affirmed, and defendant petitioned for writ of certiorari. The United States Supreme Court, 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394, denied petition. Defendant, following denial of motions to vacate convictions and sentencing, which were affirmed by the Florida Supreme Court, filed petition for habeas corpus relief. The District Court, Susan H. Black, J., held that: (1) presence of approximately 40 uniformed and armed correctional officers in spectators' section of courtroom during trial and sentencing did not intimidate or coerce jury into finding defendant guilty and sentencing him to death; (2) defendant did not show that prosecutor made discriminatory use of peremptory challenges; (3) trial court improperly considered

nonstatutory mitigating evidence only to extent that evidence tended to establish statutory mitigating factors; and (4) instructions did not lead advisory jury to believe that responsibility for determining appropriateness of defendant's death rested elsewhere.

Petition granted in part and denied in part.

Billy H. Nolas and Timothy D. Schroeder, Office of the Capital Collateral Representative, Tallahassee, Fla., for petitioner.

Gary Printy, Asst. Atty. Gen., Office of the Atty. Gen., Dept. of Legal Affairs, Tallahassee, Fla., for respondent.

OPINION AND ORDER

SUSAN H. BLACK, District Judge.

This case came on to be heard on a Petition for Writ of Habeas Corpus By Person In State Custody, filed by Ronald Woods, a death row inmate at Florida State Prison, on November 2, 1988. Respondent filed a Motion To Dismiss Petition For Writ Of Habeas Corpus (§ 2254) Relief And Response In Opposition To Stay Of Execution, on November 2, 1988.

On June 7, 1983, petitioner, then an inmate at Union Correctional Institution, was charged by indictment with the crime of first degree murder for the stabbing death of Correctional Officer John Steven Dennard, the crime of attempted first degree murder of three other correctional officers, and the crime of possession of contraband in a state penal institution. All five counts arose out of the events of May 5, 1983, for which another inmate, Leonard Bean, stood trial with petitioner.

Petitioner's trial began on September 26, 1983, and on September 30, 1983, the jury returned a verdict of guilty as charged on all counts. On October 1, 1983, the trial court conducted an advisory sentencing proceeding and, at the conclusion of this proceeding, the jury recommended, by a vote of seven to five, that petitioner be sentenced to death. The trial judge agreed with the recommendation and sentenced petitioner accordingly.[1]

Petitioner appealed his conviction and sentence of death directly to the Florida Supreme Court.[2] The Florida Supreme Court affirmed petitioner's death sentence on April 24, 1986, and denied his request for rehearing on July 18, 1986. *Woods v. State,* 490 So.2d 24 (Fla.1986). On November 10, 1986, over the dissents of Justices Brennan, Marshall, and Blackmun, the United States Supreme Court denied Woods's petition for a writ of certiorari. *Woods v. Florida,* 479 U.S. 954, 107 S.Ct. 446, 93 L.Ed.2d 394 (1986).

On October 5, 1987, the Governor of the State of Florida signed a death warrant scheduling petitioner's execution for 7:00 a.m. on December 10, 1987. Following the issuance of the death warrant, petitioner on November 6, 1987, filed a motion in the state trial court to vacate his convictions and sentence, pursuant to Fla.R.Crim.P. 3.850, and simultaneously sought a stay of execution, time for preparation and investigation, permission to amend the motion, and an evidentiary hearing.[3] These motions were denied by the trial court on November 23, 1987, as to all but one issue,[4] for which an evidentiary hearing was set. After that hearing on December 1, 1987, the trial court denied relief on the remaining ground.

On the day of the December 1, 1987, hearing, petitioner additionally moved to vacate the order of November 23, and to add five additional grounds for relief to his original 3.850 motion.[5] In an order dated December 2, 1987, the trial court

reaffirmed its original rulings, and, as to the additional five grounds, found that petitioner could have raised the issues in his prior 3.850 motion. Petitioner sought rehearing of the trial court's order,[6] but on December 4, 1987, this motion was denied.

Petitioner appealed the December 2 and December 4, 1987, orders denying his 3.850 petitions to the Florida Supreme Court.[7] On December 9, 1987, the Florida Supreme Court stayed the scheduled execution pending further order of the court. On July 14, 1988, the Florida Supreme Court affirmed the trial court's ruling on the 3.850 petition, and dissolved the December 9, 1987, stay of execution. 531 So.2d 79 (Fla.1988). On October 12, 1988, the Florida Supreme Court denied rehearing of its decision.

On October 17, 1988, the Governor of the State of Florida signed a death warrant scheduling petitioner's execution for the week beginning at noon on Thursday, November 3, 1988, and ending at noon on Thursday, November 10, 1988. Pursuant to the death warrant, the Florida State Prison Superintendent Tom Barton scheduled the execution for Friday, November 4, 1988. On October 19, 1988, the Florida Supreme Court denied petitioner's motion for a stay pending petitioner's filing of a petition for writ of certiorari in the United States Supreme Court. On October 28, 1988, the United States Supreme Court denied petitioner's application for stay of execution of sentence of death pending petitioner's petition for writ of certiorari in that Court. ____ U.S. ____, 109 S.Ct. 297, 102 L.Ed.2d 317 (1988).

Petitioner filed the instant petition with this Court on November 2, 1988, together with a Motion For Stay Of Execution and a Motion For Leave To Proceed In Forma Pauperis. On November 2, 1988, the state filed its opposition to the petition. The petition presents thirteen claims of alleged constitutional deprivation.[8]

On November 3, 1988, the Court found that a review of the questions raised in the petition could not be completed in a judicious manner within the short time remaining before the scheduled date of execution.[9] In order to facilitate this Court's review of these questions and in order to afford the parties their statutory right of appeal to the United States Court of Appeals for the Eleventh Circuit, the Court stayed the execution scheduled for November 4, 1988, and established a briefing schedule. The parties filed various supplemental memoranda. The Court conducted a non-evidentiary hearing on December 20, 1988. The Court will now address petitioner's claims.

I. *Claim I: Jury Intimidation Or Coercion*

Petitioner first argues that the presence of some forty uniformed and armed correctional officers in the spectators' section of the courtroom during his trial and sentencing intimidated or coerced the jury into finding him guilty and sentencing him to death. Defendant argues that such coercion and intimidation violates his constitutional right to a fair trial under the fourteenth amendment's due process clause.

In *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), the Supreme Court announced the test that federal courts must apply in determining whether or not a particular courtroom scene or arrangement is inherently prejudicial to a defendant in a criminal trial.[10] The Court concluded that the presence of four uniformed, armed state troopers in a courtroom, as a supplement to the state court's security force, did not violate the defendant's constitutional right to a fair trial. *Id.* at 572, 106 S.Ct. at 1347.

The Supreme Court explained that jurors were capable of drawing a wide range of inferences from the presence of armed security guards which were not inherently

prejudicial to the defendant's right to a fair trial. *Id.* at 569, 106 S.Ct. at 1346. The Court stated that jurors "are quite aware that the defendant appearing before them did not arrive there by choice or happenstance," and that the Court never required the elimination of every reminder that the state has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. *Id.* at 567, 106 S.Ct. at 1345.

After making these observations, the Court found that a federal court's review of a state court conviction on a petition for habeas corpus relief was limited. *Id.*

> All a federal court may do in such a situation is to look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to [a] defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

Id. at 572, 106 S.Ct. at 1348. This Court will conduct such a review of the courtroom scene of petitioner's state trial.

In this case, it is undisputed that petitioner, while an inmate at the Union Correctional Institution, was tried and convicted for the murder of a correctional officer. Likewise, it is undisputed that during the trial numerous armed correctional officers attended the trial and sat in the spectators' section of the courtroom. Finally, it is undisputed that petitioner moved to have the uniformed security guards excluded from the courtroom during closing argument. Furthermore, the Supreme Court of Florida found the following facts concerning the courtroom scene:

> Union is a small county. Given the number of prisons in that locality, uniformed corrections

> employees are a commonplace sight. Uniformed spectators caused no disruption [in the courtroom], although they had apparently been present throughout this trial.

Woods v. State, 490 So.2d 24, 27 (Fla.1986). The Court presumes these findings of fact correct under 28 U.S.C. § 2254(d).

The Court finds that the most likely inference that the jurors drew from the presence of the correctional officers in the courtroom, was that many correctional officers were co-workers of the victim. The Court finds it highly probable that jurors would have inferred only that the correctional officers would be interested in the trial. The Court finds it highly unlikely that jurors would infer that the correctional officers were present to intimidate them and influence the verdict.[11] The Court, therefore, cannot find the courtroom scene was inherently prejudicial to the petitioner's right to a fair trial or otherwise intimidated or influenced the jury.

Petitioner focuses particular attention on the Supreme Court's statement in *Holbrook* that the threat a "roomful" of security guards could pose to a defendant's right to a fair trial should not be "minimized." *Id.* 475 U.S. at 570-71, 106 S.Ct. at 1347. Unlike *Holbrook,* however, the armed and uniformed persons present at defendant's trial were not deployed by the court to maintain security, but attended the trial voluntarily as spectators. The Court, therefore, finds that there was no inherent prejudice arising from an inference that the defendant was "particularly dangerous or culpable" or that there existed "particular official concern or alarm." *Id.* at 569, 106 S.Ct. at 1346. The Court once again finds it highly unlikely that jurors would draw any inference from the presence of the correctional officers except that the correctional officers were interested in the trial of a defendant accused of murdering a co-worker.

II. *Claim II: Discriminatory Use Of Peremptory Challenges*

In *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court reaffirmed the well established principle that purposeful exclusion of blacks from a jury because of race violated the equal protection clause of the fourteenth amendment. *Id.* at 84, 106 S.Ct. at 1716. The Court also redefined the evidentiary burden that a defendant must satisfy to demonstrate purposeful discrimination. In particular, the Court described a criminal defendant's *prima facie* case of unconstitutional discrimination in the selection of a petit jury as follows:

> To establish such a case, the defendant must first show that he is a member of a cognizable racial group,...and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."...Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96, 106 S.Ct. at 1723 (citations omitted).[12] *See also United States v. Dennis,* 804 F.2d 1208, 1210 (11th Cir.1986), *cert. denied,* 481 U.S. 1073, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987).

The *Batson* Court stated that a defendant may establish a prima facie case of race discrimination in jury selection based on evidence derived from the jury selection solely in

the defendant's case. *Batson,* 476 U.S. at 95, 106 S.Ct. at 1722. The Court has not, however, ruled that any specific set of circumstances would establish an inference of discrimination.[13] The *Batson* Court instead directed trial courts to evaluate "all relevant circumstances." *Batson,* 476 U.S. at 96, 106 S.Ct. at 1722. The trial court's conclusion as to the establishment of a prima facie case or as to the existence of discrimination is " 'a finding of fact' entitled to appropriate deference by a reviewing court." *Batson,* 476 U.S. at 98 n. 21, 106 S.Ct. at 1724, n. 21 (quoting *Anderson v. Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)). *See also United States v. Dennis,* 804 F.2d at 1210 n. 22. Such deference is justified due to the necessity of evaluating credibility of witnesses in making a finding of race discrimination. *Batson,* 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21.

The Supreme Court stated that a prosecutor's statements during voir dire or while exercising his challenges could "support or refute" an inference of discrimination. *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723. Similarly, the Court stated that proof of a "pattern of strikes" in a particular case could raise an inference of discrimination. *Id.*

A number of courts in the Eleventh Circuit have identified various circumstances other than evidence of a "pattern" of strikes or the prosecutor's statements during voir dire relevant to determining whether or not an inference of discrimination has been established. A prosecutor's leaving black jurors unchallenged on the final jury, a prosecutor's having only a small number of black jurors on the venire from which the jurors are selected, and evidence of non-racial reasons for the prosecutor's challenges, tend to rebut an inference arising solely from an alleged pattern of discriminatory peremptory challenges.[14]

In this case, the court reporter at petitioner's trial failed to record the bench conferences where the parties exercised their peremptory challenges. *Woods v. State,* 490 So.2d 24, 25 n. 2 (Fla.1986). On petitioner's appeal to the Florida Supreme Court, the court relinquished jurisdiction for the parties to reconstruct the record. *Id.* Based on the reconstructed record, the court found and the parties agreed that voir dire in petitioner's case included nine black prospective jurors. *Id.* at 26. The court found that the state exercised peremptory challenges against five of the nine black prospective jurors, petitioner and his co-defendant exercised one peremptory challenge against a black prospective juror each, the court excused one prospective black juror for cause, and the ninth black prospective juror served as an alternate juror. *Id.* The court found that two of the black jurors peremptorily excused by the prosecutor, expressed their general reluctance to participate in deciding the case. *Id.* The court found no reason for the exclusion of the remaining three jurors, but found that petitioner failed to demonstrate a substantial likelihood that the state exercised its peremptory challenges solely on the basis of race. *Id.*

The record of the hearing on remand to the state trial court demonstrates various additional facts surrounding the prosecutor's exercise of peremptory challenges. The record reflects that the court excused fourteen people for cause, the state excused a total of thirteen peremptorily, and the defendants peremptorily excused fifteen between them. Transcript of Proceedings in the Circuit Court of Florida, Eighth Judicial Circuit In and For Union County [hereinafter "Tr."] at 13.

Given that there were twelve persons on the jury and two alternates, the Court finds that there were fifty-six potential jurors in the jury pool. The prosecutor testified that the entire venire from which the jury was selected constituted 120 persons. Tr. at 32. In addition to the nine black

prospective jurors, twelve to twenty-four of the original venire who were not prospective jurors were black. Tr. at 30. The prosecutor stated that the defendants could have used unexercised peremptory challenges to have additional black persons become prospective jurors. Tr. at 30.

The prosecutor had been allotted twenty-four peremptory challenges. Tr. at 28. The defendants had been allotted ten or twelve each. Tr. at 28 and 50. Thus, it appears that the prosecutor had eleven peremptory challenges that he did not use.

The prosecutor testified as to how he rated prospective jurors. In particular, he stated that he wanted 1) jurors who were not sympathetic to the retaliation defense, Tr. at 21; 2) jurors who were not philosophically opposed to the death penalty, Tr. at 20-21; 3) jurors who did not have an adverse reaction to law enforcement, Tr. at 21; 4) jurors who were analytical and would not take offense at having witnesses called liars, Tr. at 23; 5) jurors who are members of churches that are opposed to the death penalty, Tr. at 24; 6) jurors who were "employee types," "deadbeats," or alcoholics, Tr. at 25; and 7) jurors whose body language or answers to questions bothered the prosecutor, Tr. at 31. Based on these characteristics, the prosecutor assigned the jurors either a one, for a desirable juror; a two, for a juror for whom the prosecutor had no opinion; and a three, for an undesirable juror. Tr. at 26. The prosecutor had retained his notes as to his ratings of many of petitioner's prospective black jurors, but retained no notes as to others. The prosecutor rated both whites and blacks as threes. Tr. at 27.

The five black prospective jurors peremptorily excused by the prosecutor were Catherine Hadley, Thoretta Gibson, Joyce Bethea, Glenda Stewart, and Harvey Thomas.[15] Hadley was rated a three but the prosecutor did not remember why he gave her such a rating. Tr. at 37. It appears from

the transcript of voir dire, however, that Hadley had in-laws who worked for the Department of Corrections. Record on Appeal to the Florida Supreme Court, Volume V, [hereinafter "RA"] at 61. It further appears that Hadley worked for the Department of Corrections at one time. RA at 144. In addition, she had expressed reservations about the death penalty, RA at 74, and reluctance about participating as a juror.[16] RA at 77. She repeatedly stated her confusion about serving as a juror. RA at 77. Although the record indicates that at one point the trial judge excused Hadley for cause, RA at 77-78, this ruling was apparently rescinded and the prosecutor thereafter used a peremptory challenge to have her excused.

Thoretta Gibson was rated a three because the prosecutor had been involved as a prosecutor with members of her family. Tr. at 37. In addition, it appears that Gibson's daughter worked for the Department of Corrections. RA at 68.

Joyce Bethea was unrated and the prosecutor did not remember why he assigned her such a rating. Tr. at 38. Bethea expressed her reluctance to serve on the jury. RA at 264.[17]

Glenda Fay Stewart was unrated, and the prosecutor stated no reason for such a rating. Tr. at 38. During voir dire, Stewart stated that she and relatives of hers had worked for the Department of Corrections, RA at 316; she had heard about and discussed the case based on having seen two television reports, RA at 287; and she had recently served on a grand jury which ran for six months. RA at 319.

Harvey Thomas was rated a three, but the prosecutor did not state a reason for such a rating. Tr. at 39. It appears from the record on voir dire that Thomas had heard about the murder when it happened. RA at 409. In addition, Thomas had worked for the Department of Corrections. RA at 410.

The findings of the Florida Supreme Court as to the prosecutor's reasons for excusing black jurors are subsidiary factual findings and are entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d) and *Sumner v. Mata*, 449 U.S. 539, 545-46, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981). The court's conclusion that petitioner failed to demonstrate that the state exercised its peremptory challenges solely on the basis of race is a mixed question of law and fact and is not entitled to a presumption of correctness. Based on the subsidiary facts found by the Florida Supreme Court and the reconstructed record of the peremptory challenges, this Court will apply the three-part test announced in *Batson*.[18]

The Court finds it undisputed that petitioner is black, that he is a member of a cognizable racial group, and that the prosecutor used peremptory challenges to excuse five members of petitioner's race. The Court finds from all the circumstances, however, that petitioner has not established an inference of discriminatory use of peremptory challenges. The prosecutor had sufficient cause for excusing prospective jurors Hadley and Bethea for their reluctance in serving on the jury. The prosecutor also had sufficient cause to excuse prospective juror Gibson due to having been involved as a prosecutor with members of her family. The prosecutor also had sufficient cause to excuse Stewart and Thomas due to their prior knowledge of the case. Accordingly, the Court finds that petitioner has failed to establish a prima facie case under *Batson*.

Even if a prima facie case were established, the prosecutor effectively rebutted the prima facie case during the state evidentiary hearing. He set out his system for rating jurors and explained how he applied that system in this particular case as to three of the prospective black jurors. Although he did not assign a rating to Joyce Bethea and Glenda Fay Stewart and could not remember why he excused them, Tr.

at 40, the evidence in the record demonstrates sufficient reasons for his actions. In addition, as to Joyce Bethea, the Supreme Court of Florida found that Bethea was excused due to her reluctance to serve on the jury. This Court must presume that factual finding to be correct.[19]

In addition, the prima facie case tends to be rebutted based on the finding of the state trial judge. *See* RA at 54. The Supreme Court of the United States stated that the factual findings of the trial judge are to be given appropriate deference in light of the necessity for making credibility determinations.[20]

Petitioner argues that he is entitled to an evidentiary hearing to rebut the finding that the prosecutor did not discriminate on the basis of race. The Court finds, however, that petitioner has proffered no facts at variance with the facts considered by the state courts, or shown that the state courts have not given petitioner a full and fair opportunity to develop the facts in this case so as to justify an evidentiary hearing. *See Townsend v. Sain,* 372 U.S. 293, 312-13, 83 S.Ct. 745, 756-57, 9 L.Ed.2d 770 (1963); 28 U.S.C. § 2254(d).

III. *Claim III & IV: Denial Of Motions For Continuance*

Petitioner contends in Claim III that his attorney did not have adequate time to prepare for trial and in Claim IV, he claims that his attorney did not have adequate time to prepare for sentencing. The Florida Supreme Court addressed these questions together on direct appeal and found no constitutional violation. The Court found that the trial court had granted Woods's one motion for continuance and that nine weeks was sufficient time for counsel to prepare for trial and sentencing. This Court also finds that petitioner had adequate time to prepare for both trial and sentencing

and that there was no sixth, eighth, or fourteenth amendment violation due to the trial court's denial of petitioner's motions for continuance.

To the extent that claim IV is one for ineffective assistance of counsel for counsel's failure to discover and present mitigating evidence, the Court finds that petitioner has failed to overcome the presumption that his attorney rendered him effective assistance. In particular, petitioner has failed to show 1) that counsel has committed serious mistakes and 2) that the deficient representation prejudiced petitioner. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).

Petitioner contends that counsel's failure to produce petitioner's Hillsborough County School Records and Evaluations and the Hillsborough County Hospital Records and Psychological Screening Reports, and counsel's failure to make these records available to the medical expert constitute serious mistakes. This Court disagrees in light of the testimony concerning petitioner's mental health by Dr. Harry Krop and the testimony of petitioner's childhood by his mother. Counsel's preparation of Dr. Krop and his presentation to the sentencing jury were proper and counsel committed no serious mistakes. The allegedly deficient representation did not prejudice defendant.

IV. *Claim V: Execution Of Eighteen Year Old*

Under *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), a state court finding of procedural default bars federal court review of the claim on a petition for writ of habeas corpus absent a showing of cause and prejudice to excuse the default. Petitioner raised Claim V first before the state trial court in his motion for postconviction relief under Fla.R.Crim.P. 3.850. The trial court

appeared to deny the claim finding that petitioner had failed to support this claim with adequate statutory and case law. The Florida Supreme Court, on appeal, found the claim should have been brought on direct appeal and that it was, therefore, procedurally barred from postconviction consideration. This Court finds that petitioner has failed to demonstrate cause for failure to raise the claim on direct appeal.

V. *Claim VI & VII: Errors In Transcript*

On the 3.850 proceeding, the state trial court conducted an evidentiary hearing to determine whether or not it had instructed the sentencing jury to consider petitioner's extreme mental or emotional disturbance as an aggravating circumstance as was indicated in the transcript of the sentencing. The trial court found that the transcript was in error and that the court had properly instructed the jury to consider the fact as a mitigating factor. The Florida Supreme Court affirmed this factual finding.

This Court must presume that the state court finding is correct pursuant to 28 U.S.C. § 2254(d). This Court rejects petitioner's argument in Claim VI that the evidentiary hearing on the issue was not full, fair, and adequate to determine the factual issue. The trial court listened to a tape of the proceeding. It was unnecessary for the court to also examine the court reporter's stenographic notes or to place the court reporter on the witness stand for petitioner to cross-examine. Because the Court has found no error in the transcript, this Court also finds no basis on which to find the entire transcript of the trial and sentencing unreliable as petitioner suggests in Claim VII.

VI. *Claim VIII: Hitchcock Claim*

A. Exhaustion

In this case, it appears that the state courts did not have the opportunity to apply *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), to petitioner's case. This claim was originally raised on direct appeal to the Florida Supreme Court. That court found no error in petitioner's sentencing on April 24, 1986. *Hitchcock* was not decided until April 22, 1987. The claim was not subsequently raised on petitioner's 3.850 motion.

Because the claim was not "fairly presented" to the state courts, this Court finds that the petition contains unexhausted claims. *See Davis v. Dugger,* 703 F.Supp. 916 (M.D.Fla.1988). Petitioner's petition is, therefore, mixed. The exhaustion defense may, however, be waived by the state. *See Thompson v. Wainwright,* 714 F.2d 1495 (11th Cir.1983), *cert. denied,* 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984). If the Court in its discretion accepts the waiver, the Court may address the issue.

In this case, the state has unequivocally waived its exhaustion defense. The Court must, therefore, consider whether or not to accept the waiver. In *Davis v. Dugger,* 703 F.Supp. 916 (M.D.Fla.1988), this Court refused to accept respondent's waiver of the exhaustion defense. The Court did not accept the state's waiver 1) because of the possibility that judicial findings of fact would be required in order to address the *Hitchcock* claim and a possible harmlessness analysis, 2) because the state courts had not had sufficient time to develop their jurisprudence on Hitchcock claims, 3) because exhaustion would not have been a formality, 4) because exhaustion would take only a short length of time, and 5) because the state court's dockets were less crowded than the docket of this Court.

Although many of the same factors apply in this case, other factors support acceptance of the state's waiver. In particular, this Court finds that the *Hitchcock* claim in this case concerns only the state judge's failure to consider nonstatutory mitigating circumstances, and not the jury's failure to consider such nonstatutory mitigating circumstances. The Court, therefore, need not conduct an extensive review of the record of the sentencing in this case as would be required if this Court were analyzing the jury's consideration of nonstatutory mitigating circumstances. Because the judge's consideration of mitigating and aggravating circumstances is crystalized in the sentencing judgment, this Court's *Hitchcock* analysis is greatly simplified. Factual findings by the state court would not aid this review. The *Hitchcock* claim in this case appears to be a question of law that this Court may address quickly and without offending policies of comity and federalism. This Court will, therefore, accept the state's waiver of its exhaustion defense.

B. Hitchcock

It is well-established that under the eighth and fourteenth amendments, a sentencing body "may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *Messer v. State of Florida,* 834 F.2d 890 (11th Cir.1987). *See also Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina,* 476 U.S. 1, 4, 106 S.Ct. 1669, 1670, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma,* 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982). The Eleventh Circuit has held that there is *Lockett* error in Florida's sentencing scheme where the advisory jury or the sentencing judge fails to consider

mitigating evidence offered by the defendant. *See Messer v. State of Florida,* 834 F.2d 890, 892 (11th Cir.1987) (*citing Riley v. Wainwright,* 517 So.2d 656 (Fla.1987))21 *Armstrong v. Dugger,* 833 F.2d 1430, 1435 n. 6 (11th Cir.1987); *Magill v. Dugger,* 824 F.2d 879 (11th Cir.1987).[22]

To determine whether or not the advisory jury or sentencing judge has failed to consider mitigating evidence offered by the defendant, the courts have reviewed the entire sentencing proceeding including the arguments of counsel, the court's instructions to the jury, and the sentencing judge's written findings. *See, e.g., Hargrave v. Dugger,* 832 F.2d 1528, 1534 (11th Cir.1987) (en banc); *Messer v. State of Florida,* 834 F.2d 890, 893 (11th Cir.1987). The Court must then infer from the entire record not only whether the advisory jury and the sentencing judge were prevented from being presented with all relevant mitigating evidence, but whether or not the jury and the court were prevented from or otherwise failed to consider all relevant mitigating evidence. *Harich v. Wainwright,* 813 F.2d 1082, 1101 (11th Cir.1987), *incorporated by reference en banc, Harich v. Dugger,* 844 F.2d 1464, 1469 (11th Cir.1988) (en banc).

The Supreme Court performed such an analysis in *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).[23] The Eleventh Circuit Court of Appeals has stated that a *Lockett* claim similar to the one raised in *Hitchcock* should be determined by matching the record in the case under consideration with the record in *Hitchcock.*[24] *Hargrave v. Dugger* 832 F.2d 1528, 1534 (11th Cir.1987) (en banc). The Court will now perform such an analysis.

In this case, petitioner does not argue that the jury was prevented from considering nonstatutory mitigating circumstances, but that the judge failed to consider nonstatutory mitigating circumstances. The Court need not summarize the entire sentencing proceeding. The state trial

judge stated his entire consideration of mitigating circumstances in his sentencing judgment as follows:

> Mitigating circumstances set out in Florida Statute § 921.141(6)(a, b, c, d, e, and f) do not apply in this case.
>
> Mitigating circumstances set out in Florida Statute § 921.141(6)(g) does apply in this case. The Defendant Woods was eighteen years of age at the time of the offense.
>
> Although evidence was presented at the penalty phase in an effort to show that the mitigating circumstances set out in § 921.141(6)(f) applied to the Defendant, the evidence consisted essentially of test results that indicated a low intelligence quotient of the Defendant. The evidence was insufficient to find that the capacity of the Defendant to appreciate the criminality of his conduct to the requirements of law was substantially impaired. Therefore, this Court rejects that as a mitigating circumstance in this case.

RA at 665.

The sentencing judgment indicates that the state trial judge in this case committed the same error as did the state trial judge in *Hitchcock*.[25] Although the judge considered the evidence presented by petitioner, he considered this evidence only to the extent that the evidence tended to establish statutory mitigating factors. For example, the judge would not consider the evidence of petitioner's mental capacity except to the extent that the evidence showed insanity. Such a limitation of the judge's consideration of the evidence violates *Hitchcock*.[26]

This Court cannot find the judge's error harmless beyond a reasonable doubt. *See Knight v. Dugger,* 863 F.2d 705 (11th

Cir.1988). The Court will, therefore, order the state trial judge to resentence petitioner.

The trial judge shall consider all the evidence presented at petitioner's original sentencing proceeding as well as the jury's recommendation of death and shall prepare a new sentencing judgment comporting with the requirements of *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Because the jury was properly instructed to consider all the evidence to the extent that the evidence established any mitigating circumstances, it is unnecessary for the state to conduct an evidentiary hearing. Petitioner's sentencing hearing fully and fairly developed the factual record for petitioner's sentencing.

VII. *Claims IX, X, XI, XII, And XIII: Procedural Default*

Petitioner attempted to add these five claims to his 3.850 motion, by amendment, on the day the trial court held the evidentiary hearing on the single claim in the original 3.850 motion. The trial court denied the motion stating that petitioner could have raised those claims in his original 3.850 motion. The claims could have been raised within the time period allowed for the 3.850 petition. The trial court found that allowing petitioner to amend his original and file a new motion would circumvent the policy of finality which the procedure was created to promote.

The Florida Supreme Court on review found that the five additional claims were time barred under rule 3.851. Also, the Court found that because none of these five claims had been raised on direct appeal by petitioner, the claims were procedurally defaulted.

Petitioner has not attempted to address the cause and prejudice test articulated in *Wainwright v. Sykes,* 433 U.S.

72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), to overcome the procedural default of Claims IX, X, XI, XII, and XIII. Because no excusable cause was presented, this Court must dismiss those claims with prejudice. As to Claim XI, the *Caldwell* claim, even if it were not procedurally defaulted, the Court finds no error on the merits, as will be discussed.

VIII. *Claim XI: Caldwell*

A *Caldwell* violation occurs when the sentencer is led to believe that "the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi,* 472 U.S. 320, 328-29, 105 S.Ct. 2633, 2639-40, 86 L.Ed.2d 231 (1985). The Court in *Caldwell* believed that the sentencing jury must be aware of "the gravity of the task" at hand, and they must proceed with "appropriate awareness of its truly awesome responsibility." *Id.* at 341, 105 S.Ct. at 2646.

The Eleventh Circuit found a *Caldwell* violation in *Mann v. Dugger,* 844 F.2d 1446, 1455 (11th Cir.1988), when the prosecution repeatedly told the jury that the decision to impose the death penalty was "not legally on your shoulders."[27] The Eleventh Circuit found that the trial judge's comments did not cure the impression which the prosecution had made on the jury. *Id.* at 1458. The court held that the effect was to "diminish the jury's sense of responsibility with regards to its sentencing role." *Id.*

In *Adams v. Wainwright,* 804 F.2d 1526 (11th Cir.1986), *cert. granted,* ____ U.S. ____, 108 S.Ct. 1106, 99 L.Ed.2d 267 (1988), the Eleventh Circuit found a *Caldwell* violation because the trial court led the jury to believe that moral responsibility for imposing the death penalty rested solely on the court. The judge told the jury that "this conscience part of it is as to whether or not you're going to put the man

to death or not, that is not your decision to make." *Id.* at 1529. The Eleventh Circuit remanded the case for a new sentencing.

By contrast, the Eleventh Circuit found no *Caldwell* violation in *Harich v. Dugger,* 844 F.2d 1464, 1473 (11th Cir.1988). The court in *Harich* stated that:

> We believe the Supreme Court intended that a *Caldwell* violation should include some affirmative misstatements or misconduct that misleads the jury as to its role in the sentencing process. *Caldwell* does not mandate reversal if an *advisory* jury is told that its role is to advise or recommend.

Id. at 1473. The Eleventh Circuit examined the alleged errors in the instruction and determined that no *Caldwell* violation had occurred.

This Court finds many similarities when comparing the instructions given to the jury in *Harich,* and those given in the instant case. For example, petitioner points to the following remarks the trial judge made to the jury once the jury had been picked:

> I will now inform you of the maximum and minimum possible penalties in this case. The penalty is for the court to decide. You are not responsible for the penalty in any way because of your verdict. The possible results of this case are to be disregarded as you discuss your verdict. Your duty is to discuss only the question of whether the State has proved the guilt of the defendants in accordance with these instructions.

RA at 1458-1460. The state trial judge in *Harich* made the same remarks to the jury. *Harich,* 844 F.2d at 1474. The Eleventh Circuit quoted those remarks by the state trial

judge and concludes that it did not constitute a *Caldwell* violation.

Petitioner cites to another passage as a violation of *Caldwell:* "The final decision as to what punishment shall be imposed, rests solely with the Judge of this Court." RA at 1519. The *Harich* court cites verbatim the same sentence. *Harich,* 844 F.2d at 1474.

Petitioner quotes another passage from his trial which the trial judge recited to the jury before they retired to determine petitioner's sentence:

> As you have been told, the final decision, as to what punishment shall be imposed, is the responsibility of the judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

RA at 1665. Again, the Eleventh Circuit quotes verbatim the same passage in *Harich. Harich,* 844 F.2d at 1474.

The Eleventh Circuit found no *Caldwell* violation in *Harich. Id.* at 1475. The comments made by the trial judge and the prosecution, the court concluded, did not mislead the jury "as to the importance of its advisory role." *Id.* The comments permissibly explained the correct role of the jury and the judge in the sentencing phase. *Id.*

This Court finds after reviewing the comments made by the trial judge and the prosecution in the instant case, that those comments were identical to those approved by the Eleventh Circuit in *Harich.* This Court must follow the

rulings of the Eleventh Circuit and finds no *Caldwell* violation in the instant case.

Accordingly, it is

ORDERED:

1. That the Petition for Writ of Habeas Corpus By Persons In State Custody, filed by Ronald Woods, a death row inmate at Florida State Prison, on November 2, 1988, is granted in part and denied in part.

2. That the state trial judge shall within 180 days of the date of this order resentence petitioner considering all the evidence presented at petitioner's original sentencing proceeding as well as the jury's recommendation of death, and the state trial judge shall then prepare a new judgment and sentence for petitioner that comports with the requirements of *Hitchcock v. Dugger.*

3. That in all respects other than the one stated in paragraph two of this order, the Petition for Writ of Habeas Corpus By Person In State Custody, filed by Ronald Woods, a death row inmate at Florida State Prison, on November 2, 1988, is denied.

4. That this Court's November 3, 1988, order staying petitioner's execution is hereby dissolved.

5. That the Clerk of Court shall enter a judgment granting the petition for writ of habeas corpus to the extent that the state trial judge shall within 180 days of the date of this order resentence petitioner in accordance with *Hitchcock v. Dugger* and this Court's order, and denying the petition for writ of habeas corpus on all other claims.

DONE AND ORDERED.

ON MOTION TO ALTER OR
AMEND JUDGMENT

This case is before the Court on respondent's Motion To Alter Or Amend Judgment, filed on March 6, 1989, and petitioner's Motion To Alter And Amend Judgment And For Entry Of New Judgment, filed on March 6, 1989.

The Court will deny each motion. The Court will, however, pause to note that the state has for the first time cited a case that is in many respects similar to the case at bar. In *Daugherty v. Dugger,* 839 F.2d 1426, 1432 (11th Cir.1988) the sentencing judge instructed the jury to consider nonstatutory mitigating circumstances and stated in his sentencing order that he had considered "all the evidence." Although the sentencing judge did not state specifically that he found no nonstatutory mitigating circumstances, the court of appeals inferred from the sentencing judge's statements and his correct instruction to the jury that he had considered all nonstatutory mitigating circumstances in rendering his sentence. *Id.*

The Court has reexamined the entire record and finds the instant case distinguishable from *Daugherty v. Dugger,* 839 F.2d 1426, 1432 (11th Cir.1988). Although the sentencing judge apparently heard all the evidence presented by the petitioner at the sentencing and permitted the jury to consider the evidence, the Court finds that the sentencing judgment indicates that the judge considered the evidence only to the extent that the evidence established statutory mitigating factors.1 Such was apparently not the case in Daugherty where the sentencing judge stated that he had considered "all the evidence." Furthermore, the sentencing judge in the instant case made no statements that would indicate that he considered all the evidence to the extent that the evidence established nonstatutory mitigating factors. Accordingly, the sentencing judge's consideration of the

evidence violates *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Accordingly, it is

ORDERED:

1. That respondent's Motion To Alter Or Amend Judgment, filed on March 6, 1989, is denied.

2. That petitioner's Motion To Alter And Amend Judgment And For Entry Of New Judgment, filed on March 6, 1989, is denied.

DONE AND ORDERED.

1 Petitioner's co-defendant, Leonard Bean, also was convicted on the first degree murder charge and the contraband charge, but he was convicted on only one charge of first degree attempted murder. The advisory jury recommended life imprisonment for Bean and the judge agreed with this recommendation, imposing sentence accordingly.

2 Petitioner timely filed a notice of appeal to the Supreme Court of Florida on October 14, 1983. Subsequently, that court decided *State v. Neil*, 457 So.2d 481 (Fla.1984), in which it held that a party may be required to state the basis for exercising peremptory challenges. Petitioner filed a motion requesting that the Florida Supreme Court relinquish jurisdiction in order to permit reconstruction of the record regarding the *Neil* issue. Upon the granting of this motion, the trial court held a hearing on January 4, 1985, to reconstruct the record of challenges. This record then was certified as a part of petitioner's direct appeal.

On direct appeal to the Florida Supreme Court, petitioner presented the following issues:

> 1. The court erred in denying Woods's motion for mistrial because the prosecutor peremptorily excused black prospective jurors solely based upon their race in violation of article I, section 16 of the Florida Constitution and the sixth and fourteenth amendments to the United States Constitution.
>
> 2. The court erred in denying several of Woods's motions to continue his case in violation of his sixth and fourteenth amendment rights to a fair trial.
>
> 3. The court erred in not excluding the large numbers of uniformed department of corrections' employees from the spectators' portions of the courtroom in violation of his sixth and fourteenth amendment rights to a fair and impartial jury and right to a fair trial.
>
> 4. The court erred in sentencing Woods to death in violation of the eighth and fourteenth amendments to the United States Constitution.
>
> 5. The court erred in not finding any mitigating factor that reflected Woods's character.

3 Petitioner presented the following issues in his original 3.850 motion filed on November 6, 1987:

> 1. Mr. Woods's death sentence was imposed in violation of the eighth amendment-execution of an eighteen-year-old offender with the mental age of a twelve year old is cruel and unusual punishment.
>
> 2. Mr. Woods's sixth, eighth and fourteenth amendment rights were violated when the court refused to continue the

proceedings so that counsel could conduct a reasonable penalty-phase investigation and/or when counsel unreasonably failed to discover and present critical mitigating evidence. The error also deprived Mr. Woods of an competent mental health evaluation, in violation of the fourteenth amendment.

3. Mr. Woods's rights to a fair and impartial trial were violated by the atmosphere at trial which was so pervasively prejudicial that Mr. Woods was denied due process of law.

4. The jury was instructed that it had to consider Mr. Woods's mental problems, if found, as *aggravating* rather than mitigating circumstances, in violation of the sixth, eighth, and fourteenth amendments.

4 The court reserved ruling on petitioner's Claim 4, *see supra* note 4, that an incorrect instruction of law was read to the jury at the penalty phase.

5 Petitioner sought to add the following claims:

5. It was improper for the state to urge, and for the court to consider, the victim's close personal and professional relationship with the prosecution and the court as a basis for imposition of death, in violation of the sixth, eighth and fourteenth amendments.

6. Mr. Woods's rights under the fifth, sixth, eighth and fourteenth amendment rights were violated by the prosecutor's repeated reference to Mr. Woods's decision not to present evidence, and trial counsel's failure to object was not a matter of tactic or strategy but was an unreasonable and prejudicial omission.

7. The trial court improperly relied upon juvenile offenses and prison disciplinary reports in aggravation of punishment in imposing a sentence of death, and Mr. Woods had no meaningful opportunity to explain how these factors were actually mitigating, in violation of the sixth, eighth and fourteenth amendments.

8. The prosecutor and trial judge under Florida's bifurcated trial procedure misinformed the jury and impermissibly diminished the juror's understanding of the importance of their role and responsibility in the sentencing phase, in violation of the eighth and fourteenth amendments to the United States Constitution.

9. Mr. Woods was prejudiced when trial counsel unreasonably failed to argue in support of the motion for severance that Mr. Woods's co-defendant's lawyer was his ex-lawyer in this proceeding, and that this conflict of interest denied due process

of law, in violation of the sixth, eighth and fourteenth amendments and that conflict, in and of itself, presented a sixth, eighth and fourteenth amendment violation.

6 This motion requested that the state trial court take those steps necessary to assist petitioner in his attempts to ensure the accuracy of the record on appeal.

7 Petitioner raised the following issues on his appeal to the Florida Supreme Court:

> 1. Confidence in the reliability of the record on appeal was undermined by the state's and the trial court's actions in post-conviction, and Ronnie Woods's sixth, eighth, and fourteenth amendment rights were violated.
>
> 2. This court should stay Ronnie Woods's execution because the post-conviction record on appeal is incomplete.
>
> 3. Mr. Woods's sixth, eighth, and fourteenth amendment rights were violated when the trial court refused to continue the proceedings so that counsel could conduct a reasonable penalty-phase investigation, and/or when counsel unreasonably failed to discover and present critical mitigation evidence. The error also deprived Mr. Woods of a competent mental health evaluation, in violation of the fourteenth amendment (Claim II).
>
> 4. Mr. Woods's death sentence was imposed in violation of the eighth amendment-execution of an eighteen-year-old offender, who has the mental age of a twelve year old, is cruel and unusual punishment (Claim I).
>
> 5. Mr. Woods's rights to a fair and impartial trial were violated by the atmosphere at trial which was so pervasively prejudicial that Mr. Woods was denied due process of law, and trial counsel ineffectively presented and/or preserved the issue, in violation of the sixth, eighth, and fourteenth amendments.
>
> 6. The jury was instructed that it had to consider Mr. Woods's mental problems, if found, as aggravating rather than mitigating circumstances, in violation of the sixth, eighth, and fourteenth amendments (Claim IV).
>
> 7. Ronnie Woods should be afforded the opportunity to demonstrate that, with regard to claims V-IX, the facts were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty (30) day period of Rule 3.851.
>
> 8. It was improper for the state to urge, and for the court to consider, the victim's close personal and professional

relationship with the prosecution and the court, as a basis for imposition of death, in violation of the sixth, eighth and fourteenth amendments (Claim V).

9. Mr. Woods's rights under the fifth, sixth, eighth and fourteenth amendment rights were violated by the prosecutor's repeated reference to Mr. Woods's decision not to present evidence, and trial counsel's failure to object was not a matter of tactic or strategy, but was unreasonable and prejudicial omission (Claim VI).

10. The trial court improperly relied upon juvenile offenses and prison disciplinary reports in aggravation of punishment, in imposing a sentence of death, and Mr. Woods had no meaningful opportunity to explain how these factors were actually mitigating, in violation of the sixth, eighth and fourteen amendments.

11. The prosecutor and trial judge under Florida's bifurcated trial procedure misinformed the jury and impermissible diminished the jurors' understanding of the importance of their role and responsibility in the sentencing phase, in violation of the eighth and fourteenth amendments to the United States Constitution (Claim VIII).

12. Mr. Woods was prejudiced when trial counsel unreasonably failed to argue in support of the motion for severance that Mr. Woods's co-defendant's lawyer was his ex-lawyer in this proceeding, and that this conflict of interest denied due process of law, in violation of the sixth, eighth and fourteenth amendments and that conflict, in and of itself, presented a sixth, eighth and fourteenth amendment violation (Claim 14).

8 Petitioner presents the following claims:

1. Mr. Woods was denied a fair trial in violation of his sixth, eighth, and fourteenth amendment rights, when the state and the trial court refused to remove, or control the presence of, numerous uniformed, armed correctional officers.

2. The prosecutor peremptorily excused black prospective jurors solely based upon their race in violation of the eighth and fourteenth amendments.

3. The court erred in denying Mr. Woods's motions to continue his case, in violation of his sixth, eighth, and fourteenth amendment rights.

4. Mr. Woods's sixth, eighth, and fourteenth amendment rights were violated because the trial court refused to continue the proceedings so that counsel could conduct a reasonable penalty-phase investigation, because counsel

unreasonably failed to discover and present critical mitigating evidence, and because, consequently, Mr. Woods was deprived of his rights to a professionally adequate pre-trial mental health evaluation, in violation of the fourteenth amendment.

5. Mr. Woods's death sentence was imposed in violation of the eighth amendment-execution of an eighteen-year-old offender, who has the mental age of a twelve year old, is cruel and unusual punishment.

6. The jury was instructed that it had to consider Mr. Woods's mental problems, if found, as *aggravating* rather than mitigating circumstances, in violation of the sixth, eighth, and fourteenth amendments.

7. Confidence in the reliability of the record on appeal was undermined by the state's and the trial court's actions during the state court proceedings, in post-conviction, and Mr. Woods's sixth, eighth, and fourteenth amendment rights were violated.

8. The trial court erred by failing to consider Mr. Woods's mental deficiencies as mitigating circumstances, which must be considered regardless of whether the mental deficiencies rise to the level of statutory mitigating circumstances, in violation of the sixth, eighth, and fourteenth amendments.

9. It was improper for the state to urge, and for the jury and court to consider, the victim's close personal and professional relationship with the prosecution and the court and other improper factors, as a basis for the imposition of death, in violation of the sixth, eighth, and fourteenth amendments.

10. Mr. Woods's rights under the fifth, sixth, eighth, and fourteenth amendments were violated by the prosecutor's repeated reference to Mr. Woods's decision not to present evidence, and trial counsel's failure to object was not a matter of tactic or strategy, but was an unreasonable and prejudicial omission.

11. The prosecutor and trial judge under Florida's bifurcated trial procedure misinformed the jury and impermissibly diminished the jurors' understanding of the importance of their role and responsibility in the sentencing phase, in violation of the eighth and fourteenth amendments of the United States Constitution.

12. Mr. Woods was prejudiced when trial counsel unreasonably failed to argue in support of the motion for severance that Mr. Woods's co-defendant's lawyer was Mr. Woods's ex-lawyer

in this proceeding, and this conflict of interest denied Mr. Woods due process of law, in violation of the sixth, eighth, and fourteenth amendments.

13. The trial court improperly relied upon juvenile offenses and prison disciplinary reports in aggravation of punishment and in imposing a sentence of death, and Mr. Woods had no meaningful opportunity to explain how these factors were actually mitigating, or to rebut such "evidence," in violation of the sixth, eighth, and fourteenth amendments.

9 On November 2, 1988, this Court entered an order finding that petitioner's Claim VIII appeared to be an unexhausted claim. The Court found that although the petitioner had argued in the state courts that his sentencing was unconstitutional because the sentencer was prevented from considering nonstatutory mitigating evidence, the state courts did not consider this argument in light of *Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The Court found that the *Hitchcock* claim was a sufficient change in the law that Claim VIII was not fairly presented to the state courts and was, therefore, not exhausted under 28 U.S.C. § 2254(b) & (c). *See Picard v. Connor,* 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971).

The Court then, pursuant to *Thompson v. Wainwright,* 714 F.2d 1495 (11th Cir.1983), *cert. denied,* 466 U.S. 962, 104 S.Ct. 2180, 80 L.Ed.2d 562 (1984), gave the respondent the opportunity to notify the Court as to whether or not he wished to waive the exhaustion defense. Respondent notified the Court that he believed Claim VIII was procedurally barred. In the alternative, respondent argued that the claim was exhausted. Finally, respondent stated that if the claim was not exhausted, that respondent would waive the exhaustion defense. On the morning of November 3, 1988, petitioner filed a Motion For Leave To File Response To Respondent's Notice Regarding Hitchcock/Lockett Claim. The petitioner argued that the respondent incorrectly argued that the Hitchcock claim was procedurally barred.

The order filed November 3, 1988, stated that if the Court found a *Hitchcock* violation, the Court would then have to address the question whether or not any possible *Hitchcock* violation was harmless beyond a reasonable doubt. *See Clark v. Dugger,* 834 F.2d 1561, 1569-70 (11th Cir.1987), *cert. denied,* ____ U.S. ____, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988); *Armstrong v. Dugger,* 833 F.2d 1430, 1436 (11th Cir.1987); *Tafero v. Dugger,* 681 F.Supp. 1531, 1535 (S.D.Fla.1988); *Cooper v. Dugger,* 526 So.2d 900, 903 (Fla.1988); *Mikenas v. Dugger,* 519 So.2d 601 (Fla.1988). The Court ordered the parties to brief this issue as to the law and the facts of this case.

The Court expressed its displeasure that the parties did not more thoroughly analyze the aforementioned issues in their briefs filed in the

state court and this Court. As a matter of comity and federalism as well as for the most efficient administration of justice, this Court would have preferred that these issues have been presented to the state courts in the first instance. A review by the state courts of the harmlessness question would have been particularly helpful in that harmlessness is a mixed question of law and fact. *See Grizzell v. Wainwright,* 692 F.2d 722, 725 (11th Cir.1982), *cert. denied,* 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983). Although the state courts' conclusions as to harmlessness of an error in a sentencing proceeding are not entitled to a presumption of correctness under 28 U.S.C. § 2254(d) and *Sumner v. Mata,* 449 U.S. 539, 545-46, 101 S.Ct. 764, 768-69, 66 L.Ed.2d 722 (1981), the state courts' findings as to "subsidiary factual questions" are entitled to a presumption of correctness. *See Lightbourne v. Dugger,* 829 F.2d 1012, 1018 (11th Cir.1987), *cert. denied,* ____ U.S. ____, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988). Whether or not the evidence establishes a particular mitigating or aggravating factor is entitled to such a presumption of correctness. *See Adams v. Wainwright,* 709 F.2d 1443, 1448 (11th Cir.1983), *cert. denied,* 464 U.S. 1063, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984).

10 In *Holbrook,* the defendant Charles Flynn and five co-defendants being tried together were held in custody without bail during trial. 475 U.S. at 565, 106 S.Ct. at 1344. To maintain security during the trial, the court used six customary courtroom security officers, *id.* at 564 & 570, 106 S.Ct. at 1343 & 1346, two deputy sheriffs, *id.* at 570, 106 S.Ct. at 1346, and four uniformed state troopers. *Id.* at 562 & 570, 106 S.Ct. at 1342 & 1346. It was the court's policy to maintain at least two security guards per defendant, however, the court did not have sufficient courtroom security guards available. *Id.* at 564, 106 S.Ct. at 1343. In addition, the court could not have plain clothes troopers due to unavailability and the trooper's union contract. *Id.* at 564-65, 106 S.Ct. at 1343-44.

11 The Court notes here that petitioner has proffered no evidence, other than the presence of the correctional officers in the courtroom, to support his argument that they intimidated the jury and influenced their verdict. The Court's analysis of juror intimidation is, therefore, limited to an examination of the courtroom scene in this case.

12 This Court notes that the second element of the Supreme Court's formulation "constitutes a conclusive presumption rather than a distinct factual inquiry." *United States v. Lewis,* 837 F.2d 415, 417 n.3 (9th Cir.), *cert. denied,* ____ U.S. ____, 109 S.Ct. 304, 102 L.Ed.2d 323 (1988). Various panels of the Eleventh Circuit Court of Appeals have apparently reached the same conclusion in reformulating the Batson prima facie case. These panels have stated that a defendant must prove: 1) that the defendant is a member of a cognizable racial group; 2) that the prosecutor exercised challenges to exclude members of the defendant's race from the jury; 3) that an inference may be found that the venirepersons were removed because of race. *Jones v. Davis,* 835 F.2d 835, 837 (11th Cir.), *cert. denied,*

___ U.S. ___, 108 S.Ct. 1735, 100 L.Ed.2d 199 (1988); *High v. Kemp*, 819 F.2d 988, 992 (11th Cir.1987), *cert. granted in part*, ___ U.S. ___, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). The Eleventh Circuit Court of Appeals has apparently collapsed the second and third prongs of the Supreme Court's formulation of the prima facie case into the element requiring the defendant to establish an inference of discrimination.

---

13 The *Batson* Court did not consider whether or not the defendant had established a prima facie case of discrimination on the facts of that case. Instead, the Court remanded the case for the trial court to make the determination. *Batson*, 476 U.S. at 100, 106 S.Ct. at 1725. The Court similarly remanded for such a determination in *Griffith v. Kentucky*, 479 U.S. 314, 327-29, 107 S.Ct. 708, 715-16, 93 L.Ed.2d 649, 661-62 (1987).

---

14 In *United States v. Dennis*, 804 F.2d 1208 (11th Cir.1986), *cert. denied*, 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987), the defendant relied exclusively on an alleged pattern of discriminatory peremptory challenges to create an inference of discrimination. The court did not find an inference of discrimination where 1) the prosecutor used two of three peremptory challenges to strike black jurors, 2) the prosecutor did not use three of his six peremptory challenges, 3) the prosecutor used one of his allotted peremptory challenges in selecting alternate jurors to strike an alternate juror who was black, 4) the prosecutor allowed two black jurors to remain on the final jury panel, and 5) there was evidence that one of the stricken jurors was a victim of a burglary and another was a government witness in the past. *Id.* at 1210-11. The court did not describe the racial composition of the entire jury venire. Instead, the court found that any inference of discrimination was undercut by the presence of two black jurors on the panel who remained unchallenged by the prosecutor. *Id.* at 1211.

In *United States v. David*, 662 F.Supp. 244, 246 (N.D.Ga.1987), *aff'd on other grounds*, 844 F.2d 767 (11th Cir.1988), the defendant relied on an inference arising solely from an alleged "pattern" of peremptory challenges. The district court found that the defendant had not established a prima facie case of discrimination where three of the twenty-eight jurors on the panel were black. In that case, the prosecutor used two of six peremptory challenges to strike black jurors. In the selection of alternates from a separate three-member alternate panel, two of whom were black, the prosecutor used a peremptory challenge to strike one black juror.

A prosecutor's failure to explain every peremptory strike of black jurors is not necessarily fatal to the prosecutor's ability to rebut a prima

cert. denied, ____ U.S. ____, 108 S.Ct. 1735, 100 L.Ed.2d 199 (1988); *High v. Kemp*, 819 F.2d 988, 992 (11th Cir.1987), *cert. granted in part*, ____ U.S. ____, 108 S.Ct. 2896, 101 L.Ed.2d 930 (1988). The Eleventh Circuit Court of Appeals has apparently collapsed the second and third prongs of the Supreme Court's formulation of the prima facie case into the element requiring the defendant to establish an inference of discrimination.

---

13 The *Batson* Court did not consider whether or not the defendant had established a prima facie case of discrimination on the facts of that case. Instead, the Court remanded the case for the trial court to make the determination. *Batson*, 476 U.S. at 100, 106 S.Ct. at 1725. The Court similarly remanded for such a determination in *Griffith v. Kentucky*, 479 U.S. 314, 327-29, 107 S.Ct. 708, 715-16, 93 L.Ed.2d 649, 661-62 (1987).

---

14 In *United States v. Dennis*, 804 F.2d 1208 (11th Cir.1986), *cert. denied*, 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987), the defendant relied exclusively on an alleged pattern of discriminatory peremptory challenges to create an inference of discrimination. The court did not find an inference of discrimination where 1) the prosecutor used two of three peremptory challenges to strike black jurors, 2) the prosecutor did not use three of his six peremptory challenges, 3) the prosecutor used one of his allotted peremptory challenges in selecting alternate jurors to strike an alternate juror who was black, 4) the prosecutor allowed two black jurors to remain on the final jury panel, and 5) there was evidence that one of the stricken jurors was a victim of a burglary and another was a government witness in the past. *Id.* at 1210-11. The court did not describe the racial composition of the entire jury venire. Instead, the court found that any inference of discrimination was undercut by the presence of two black jurors on the panel who remained unchallenged by the prosecutor. *Id.* at 1211.

In *United States v. David*, 662 F.Supp. 244, 246 (N.D.Ga.1987), *aff'd on other grounds*, 844 F.2d 767 (11th Cir.1988), the defendant relied on an inference arising solely from an alleged "pattern" of peremptory challenges. The district court found that the defendant had not established a prima facie case of discrimination where three of the twenty-eight jurors on the panel were black. In that case, the prosecutor used two of six peremptory challenges to strike black jurors. In the selection of alternates from a separate three-member alternate panel, two of whom were black, the prosecutor used a peremptory challenge to strike one black juror.

A prosecutor's failure to explain every peremptory strike of black jurors is not necessarily fatal to the prosecutor's ability to rebut a prima

facie case. *United States v. David,* 803 F.2d 1567, 1571 (11th Cir.1986). A single strike of a black juror, however, for racial reasons violates the equal protection clause, even where other black jurors are seated and even when there are valid reasons for the striking of some black jurors. *United States v. Gordon,* 817 F.2d 1538, 1541 (11th Cir.1987), *vacated in part on other grounds,* 836 F.2d 1312 (11th Cir.), *cert. dismissed,* ____ U.S. ____, 109 S.Ct. 28, 101 L.Ed.2d 979 (1988).

15 Maybelle Webb was a black juror who served as an alternate. Tr. at 16. Ella Jane Perry was a prospective black juror excused by the petitioner. Cathy Watkins was excused for cause by the prosecutor. *Woods,* 490 So.2d at 26 n.3. Petitioner's co-defendant Bean excused a prospective black juror. *Id.* at 26.

16 This is apparently one of the two jurors whom the Florida Supreme Court found was excused for a race neutral reason. This finding is entitled to a presumption of correctness.

17 This is apparently the second of the two jurors whom the Florida Supreme Court found was excused for a race neutral reason. This finding is entitled to a presumption of correctness.

18 The Court notes that none of the state courts had the opportunity to apply *Batson* to petitioner's case. *Batson* was decided by the United States Supreme Court on April 30, 1986. The Supreme Court of Florida affirmed petitioner's conviction and sentence on April 24, 1986, without either party bringing *Batson* to the court's attention. The Court notes, however, that petitioner raised *Batson* on a motion for rehearing before the Florida Supreme Court which the court summarily denied.

The Court also notes that although the state courts did not have the opportunity to apply *Batson* to petitioner's case, petitioner's conviction was not "final." *Griffith v. Kentucky,* 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 712 n. 6, 93 L.Ed.2d 649, 657 n. 6 (1987); *Allen v. Hardy,* 478 U.S. 255, 258 n. 1, 106 S.Ct. 2878, 2880 n. 1, 92 L.Ed.2d 199 (1986). Accordingly, *Batson* may be applied retroactively to petitioner's conviction. *Griffith,* 479 U.S. at 327-29, 107 S.Ct. at 715-16, 93 L.Ed.2d at 661-62.

19 The prosecutor's failure to articulate an objective reason for exercising a peremptory challenge on remand will not necessarily render a conviction void so long as the totality of the circumstances do not support an inference of discrimination. *See United States v. David,* 803 F.2d 1567, 1571 (11th Cir.1986); *United States v. Forbes,* 816 F.2d 1006, 1011 n.7 (5th Cir.1987).

20 Even if petitioner had established a discriminatory use of peremptory challenges, that error is harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 21-24, 87 S.Ct. 824, 826-28, 17 L.Ed.2d 705 (1967). Cf. *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617,

88 L.Ed.2d 598 (1986); *United States v. Thompson*, 827 F.2d 1254, 1261 (9th Cir.1987). Although discrimination by the prosecutor is unquestionably a constitutional violation and undermines the appearance of fairness in the system of justice, constitutional violations do not necessarily render a state prosecution void if the result would remain unaffected by the violation beyond a reasonable doubt. Any possible discrimination by the prosecutor in this case would not have altered the jury's verdict in light of the overwhelming evidence of petitioner's guilt as well as the existence of two aggravating circumstances that support the jury's recommendation of death in this case.

Although four members of the Supreme Court have stated that harmless error analysis would not apply to systematic exclusion of black persons from a grand jury, *see Vasquez*, 474 U.S. at 263-64, 106 S.Ct. at 623-24, four members of the Court stated that harmless error analysis would apply. *See* 474 U.S. at 268, 106 S.Ct. at 626 (Powell dissenting, joined by Burger and Rehnquist); 474 U.S. at 264 n. 6, 106 S.Ct. at 624 n. 6 (Justice White specifically did not join Part III, paragraph 6 of opinion of Justice Marshall). Justice O'Connor stated no view on the issue in her concurrence in the judgment of the Court. *See* 474 U.S. at 266-67, 106 S.Ct. at 625-26.

21 The Florida Supreme Court has stated that "the standards imposed by Lockett bind both the judge and the jury under our law.... If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." *Riley v. Wainwright*, 517 So.2d 656, 659 (Fla.1987).

22 One Eleventh Circuit panel had concluded that preclusion of the jury from considering nonstatutory mitigating factors was not erroneous so long as the sentencing judge did consider all the nonstatutory mitigating factors. *Elledge v. Dugger*, 823 F.2d 1439, 1449 (11th Cir.1987). That panel subsequently withdrew that portion of the opinion apparently to resolve the inconsistency with other panels. *Elledge v. Dugger*, 833 F.2d 250, 250 (11th Cir.1987).

23 The Supreme Court summarized its holding as follows:

> It could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1, 90 L.Ed.2d 1, 106 S.Ct. 1669 (1986), and *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954, 9 Ohio Ops.3d 26 (1978)(plurality opinion). Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing, our cases

> hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

481 U.S. at 398-99, 107 S.Ct. at 1824, 95 L.Ed.2d at 353.

24 The *Messer* panel summarized the material facts of *Hitchcock* as follows:

> [In *Hitchcock*], the defense attorney had introduced some nonstatutory mitigating evidence, and although his stress in closing argument was on statutory mitigating circumstances, he also referred to several nonstatutory mitigating factors and invited the jury to consider "the whole ball of wax." By contrast the prosecutor's closing argument told the jury to consider the mitigating circumstances by number, and then went down the statutory list one by one. In addition, the trial judge instructed the jury that "[t]he mitigating circumstances you may consider shall be the following... (listing the statutory mitigating circumstances)." *Id.* 107 S.Ct. at 1824. Imposing the death sentence, the sentencing judge found that "there [were] insufficient mitigating circumstances as *enumerated in Florida Statute 921.141(6)* to outweigh the aggravating circumstances." *Id.* (Emphasis in the Supreme Court text which quotes the trial record).

Messer, 834 F.2d at 893.

25 The *Hitchcock* Court described the state trial judge's consideration of nonstatutory mitigating circumstances as follows. "In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to *certain enumerated* 'aggravating' and 'mitigating' circumstances. 10 Record 195 (emphasis added). The only mitigating circumstance he found was petitioner's youth. *Id.,* at 197." *Hitchcock,* 481 U.S. at 398, 107 S.Ct. at 1824, 95 L.Ed.2d at 353.

26 The Court notes that the state trial judge apparently complied with the law on mitigating circumstances at the time and did not have the benefit of the Supreme Court's decision in *Hitchcock.*

27 The prosecutor repeated this during voir dire questioning, during his closing arguments at the guilt/innocence phase of the trial, and during his closing arguments at the sentencing hearing.

1 The strongest indication that the sentencing judge considered the evidence only to the extent that the evidence established a statutory mitigating factor was the judge's discussion of the evidence of mental incapacity. The judge's analysis was as follows:

> Although evidence was presented at the penalty phase in an effort to show that the mitigating circumstance set out in § 921.141(6)(f) applied to the Defendant, the evidence consisted essentially of test results that indicated a low intelligence quotient of the Defendant. The evidence was insufficient to find that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Therefore, this Court rejects that as a mitigating circumstance in this case.

Sentencing Judgment at 3. This Court cannot find from this analysis that the sentencing judge considered the evidence to the extent that it established nonstatutory factors.

Ronald WOODS, Appellant,

v.

STATE of Florida, Appellee.

No. 64509.

Supreme Court of Florida.

April 24, 1986.

Rehearing Denied July 18, 1986.

Defendant was convicted of first-degree murder and sentenced to death before the Circuit Court, Union County, R.A. Green, J., and defendant appealed. The Supreme Court held that: (1) defendant failed to demonstrate a substantial likelihood that State's peremptory challenges to prospective jurors was based solely on race; (2) trial court did not abuse its discretion in refusing to grant continuance; (3) trial court did not abuse its discretion in failing to exclude uniformed spectators from courtroom; (4) evidence supported trial court's disparate treatment of defendants in sentencing; and (5) trial court did not err in failing to find more mitigation in sentencing defendant to death.

Affirmed.

Shaw, J., dissented and filed opinion.

Michael E. Allen, Public Defender and David A. Davis, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Lawrence A. Kaden and John M. Koenig, Jr., Asst. Attys. Gen., Tallahassee, for appellee.

PER CURIAM.

Ronald Woods appeals his conviction of first-degree murder and sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution. After reviewing this case, we affirm both the conviction and sentence.

Woods and Leonard Bean, both inmates at Union Correctional Institution, stabbed four guards, one of whom died during surgery. The state charged each of them with one count of first-degree murder, three counts of attempted first-degree murder, and possession of contraband (the knives used in the stabbings). In a joint trial the jury convicted both Woods and Bean of first-degree murder and possession of contraband. It also convicted Woods of all three counts of attempted murder,[1] but convicted Bean of only one of those attempts. After the sentencing proceeding, the jury recommended that Woods be sentenced to death and that Bean receive a sentence of life imprisonment. The trial court agreed with the recommendations and sentenced the defendants accordingly.

During voir dire, one of Woods' attorneys objected to the state's use of its peremptory challenges to remove black prospective jurors. The court overruled the objection, and jury selection and trial continued. A full year after the completion of the trial, but before we heard this appeal, this Court filed its opinion in *State v. Neil,* 457 So.2d 481 (Fla.1984). In *Neil* we held that a party may be required to state the basis for exercising peremptory challenges. Woods filed a motion asking this Court to relinquish jurisdiction in order to reconstruct the record regarding the *Neil* issue.[2] The reconstructed record, however, demonstrates no likelihood of abuse of its peremptory challenges by the state

such as would require the trial court to inquire into the state's motive behind excusing these persons.

At trial Woods' attorney made a single objection to the state's exercise of its peremptory challenges. This occurred after the state had used ten peremptories. Defense counsel contended that six of those had been exercised against blacks and that the state had "removed every black that was on this jury." The reconstructed record shows this claim to be not exactly correct because at that time Bean's attorney had excused one of the first six blacks.

Voir dire in this case extended through nine black prospective jurors. On the reconstructed record the parties agreed that the state exercised peremptory challenges against six of the nine, Bean and Woods excused one each, and the ninth served as an alternate juror. In *Neil* we stated that " 'exclusion of a significant number of black potential jurors...will be insufficient, in and of itself, to warrant reversal of a trial court's determination not to make inquiry.' " 457 So.2d at 486, *quoting People v. Thompson,* 79 A.D.2d 87, 111, 435 N.Y.S.2d 739, 755 (1981). This is so because the reasons for excusing such persons may have been readily apparent to the judge and others in attendance at the voir dire. *Id.* Such is the case here.

The transcript of the voir dire shows that one of the people the parties thought had been peremptorily excused had actually been excused for cause.[3] Of the remaining five, two clearly expressed their general reluctance to participating in deciding this case.[4] The three other peremptories exercised against blacks by the state simply do not rise to the level needed under Neil. Woods has failed to demonstrate a substantial likelihood that the state exercised its peremptory challenges solely on the basis of race.[5]

The public defender initially represented both Woods and Bean after their arrest in June 1983. In July the public

defender's office withdrew from representing Woods, and the trial court appointed a new lawyer for him. The trial started nine weeks later. After granting one continuance, the trial court refused to continue the case again, and Woods now claims that this constituted unnecessary speed which denied him a fair trial because his defense could not be prepared adequately.

Granting or not granting a continuance is within a trial court's discretion. *Lusk v. State,* 446 So.2d 1038 (Fla.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984); *Williams v. State,* 438 So.2d 781 (Fla.1983), *cert. denied,* 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984); *Jent v. State,* 408 So.2d 1024 (Fla.1981), *cert. denied,* 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982). A trial court's ruling on a continuance will not be disturbed unless an abuse of discretion is shown. *Jent.* Woods has demonstrated no such abuse here. The trial court granted Woods' first motion for a continuance, but refused the next one. Woods' counsel argued that he needed more time to investigate the possibility of an inmate group's having coerced Woods into attacking the victims. A prison investigation, however, had never connected Woods to that group, and counsel's contentions amount to nothing more than conjecture and speculation. This case is a far cry from *Valle v. State,* 394 So.2d 1004 (Fla.1981), where counsel had only twenty-four days to prepare for trial, and our review of the record reveals no abuse of discretion here.

A number of department of corrections employees attended this trial dressed in their uniforms. Just prior to closing argument Woods' counsel asked the trial court to clear the courtroom of the uniformed spectators. The court refused that request, and Woods now argues that the presence of these uniformed employees intimidated the jury, thereby denying him a fair trial.

In making this argument Woods relies on *State v. Gens,* 107 S.C. 448, 93 S.E. 139 (1917), *United States v. Rios Ruiz,* 579 F.2d 670 (1st Cir.1978), and *State v. Franklin,* 327 S.E.2d 449 (W.Va.1985). In *Gens* the South Carolina Supreme Court reversed Gens' conviction of transporting liquor because, during trial, several women had held up large posters condemning liquor before the jury. In *Rios Ruiz* the first circuit upheld the trial court's asking three uniformed policemen to leave the courtroom during the trial of a policeman accused of beating two persons while arresting them.[6] In *Franklin* West Virginia's Supreme Court reversed Franklin's conviction for driving under the influence of alcohol resulting in death because the local sheriff, president of the local Mothers Against Drunk Driving (MADD) chapter, and ten to thirty spectators wore large, bright yellow MADD buttons while attending the trial.

Courts have the inherent power to preserve order in the courtroom, to protect the rights of the parties, and to further the interests of justice. *Miami Herald Publishing Co. v. Lewis,* 426 So.2d 1 (Fla.1982). Excluding spectators, in effect closing a trial, is largely a matter of discretion with the court, *see Bundy v. State,* 455 So.2d 330 (Fla.1984), but the primary aim in such an exclusion is to preserve the defendant's rights. *Bundy; Green v. State,* 135 Fla. 17, 184 So. 504 (1938). Here, although the question is close, we find no likelihood of prejudice or intimidation sufficient to demonstrate an abuse of discretion in the trial court's failure to exclude the uniformed spectators.

Union is a small county. Given the number of prisons in that locality, uniformed corrections employees are a commonplace sight. Uniformed spectators caused no disruption, although they had apparently been present throughout this trial. On voir dire the prospective jurors indicated that they would follow the evidence and the law in their deliberations and would not be swayed by outside influences. In some

instances the mere presence of certain persons may be intimidating. *Franklin; Rios Ruiz.* Such is not always the case, however. *Compare State v. Richey,* 298 S.E.2d 879 (W.Va.1982) (high school students need not be excluded from watching trial of man accused of raping one of their classmates). Here, we can find no indication that the jury failed to perform its duty properly. We find that the trial court did not err in failing to exclude the complained-about spectators.

As stated earlier, the jury recommended that Woods be sentenced to death and that his co-defendant Bean be sentenced to life imprisonment. Woods now claims that the trial court erred in following the jury's recommendation because he and Bean had similar characteristics and were equally culpable. The record, however, belies Woods' claims of equal culpability. Witnesses testified that Woods, rather than Bean, was the homicide victim's prime attacker. Woods, not Bean, told the victim he would die while the victim begged for his life. Woods, not Bean, held the office door shut to prevent other corrections officers from rescuing the victim. Finally, Woods stabbed a total of four guards, while Bean attacked only two. The record clearly supports the jury and trial court's disparate treatment of these defendants. *See Demps v. State,* 395 So.2d 501 (Fla.), *cert. denied,* 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).

As his final point on appeal, Woods argues that the trial court failed to consider unrebutted nonstatutory mitigating evidence regarding Woods' low intelligence and his past life.[7] That the trial court did not articulate how he considered and analyzed the mitigating evidence is not necessarily an indication that he failed to do so. We do not require that trial courts use "magic words" when writing sentencing findings, and we recognize that some findings are inartfully drafted. *Davis v. State,* 461 So.2d 67 (Fla.1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 3540, 87 L.Ed.2d 663 (1985). The

trial court did not restrict the presentation of mitigating evidence, and we find no indication in the findings of fact that the court ignored that evidence. We find no error in the trial court's failure to find more in mitigation in this case. *See Stano v. State,* 473 So.2d 1282 (Fla.1985).

Our review shows Woods' convictions and sentences to be supported by the record. We therefore affirm them.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, McDONALD and EHRLICH, JJ., concur.

SHAW, J., dissents with an opinion.

SHAW, Justice, dissenting.

I would reverse the conviction on the basis that the presence of approximately forty-five corrections officers in uniform, approximately half the public in attendance during closing argument to the jury, effectively denied appellant a fair trial. The state concedes that this Court has already recognized that Union County is a small county and that many of the citizens of that county either work for the Department of Corrections or are related to such workers. *Lusk v. State,* 446 So.2d 1038 (Fla.), *cert. denied,* ____ U.S. ____, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984), and *Morgan v. State,* 415 So.2d 6 (Fla.), *cert. denied,* 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

Appellant does not argue that the presence of the uniformed corrections officers amounts to per se reversible error. His argument is that under the unique circumstances of this case, the presence of such a large number of uniformed officers at the most emotionally charged stage of the trial amounted to an abuse of judicial discretion. I agree.

An accused is entitled to a trial before an impartial jury unaffected by outside forces and influences. The presence of forty-five uniformed corrections officers is, in my mind, no less prejudicial than the presence of forty-five friends of a murder victim appearing en masse at the trial of the accused assailant, bearing signs expressing their concerns regarding the outcome of the trial. Exhibitions of this nature have no place in a court of law because of the great possibility of jury intimidation or coercion. Having denied appellant's motion for a change of venue, the trial court assumed the heavy burden of ensuring that the fairness of the trial was not compromised by the venue and the deep public interest in the trial. I am persuaded that the trial judge abused his discretion in not requiring the removal of the uniformed corrections officers, and that in the interest of justice a new trial should be granted.*

I agree with the majority's analysis and disposition of the other issues raised.

1 Woods does not appeal his other convictions and sentences. Our review of the record, however, shows them to be amply supported by the evidence, and we therefore affirm them.

2 We held in *Neil* that that case would not be applied retroactively because of the difficulty presented by incomplete records and reliance on former standards. Our reversal in *Andrews v. State*, 459 So.2d 1018 (Fla.1984), should not be seen as a retreat from that stand because the record in *Andrews* met the *Neil* criteria. Woods objected to the state's conduct, and, in our discretion, we allowed reconstruction of the record because the court reporter had not recorded and transcribed the bench conferences where the sides exercised their peremptories. Even now this record is the bare minimum we would expect from one seeking review of the *Neil* issue on appeal, i.e., a timely objection to the systematic excusal of blacks and an identification of the number of and names of those struck.

3 The state challenged Watkins for cause. She responded affirmatively when the trial court asked her: "You would not be a fair juror?" Defense counsel did not object to her excusal.

4 Not wanting a reluctant juror is not evidence of discrimination.

5 The state also used peremptory challenges against seven white prospective jurors.

6 On appeal Rios Ruiz claimed that removing these three spectators denied him a fair and public trial.

7 The trial court found the following aggravating circumstances under § 921.141(5), Fla.Stat. (1983): 1) committed by person under sentence of imprisonment, § 921.141(5)(a); and 2) committed to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws, § 921.141(5)(g). We find these aggravating factors amply supported by the record. The trial court found Woods' age (18 years) to be a mitigating circumstance. § 921.141(6)(g).

* Fla.R.App.P. 9.140(f):

Scope of Review. The court shall review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. In the interest of justice, the court may grant any relief to which any party is entitled. In capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review.

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL
CIRCUIT, INAND FOR UNION
COUNTY, FLORIDA

CASE NO. 83-81-CF

STATE OF FLORIDA,

vs.
RONALD WOODS and
LEONARD BEAN,

Defendants.
_____/

STATE OF FLORIDA)

COUNTY OF UNION)

PROCEEDINGS before the Honorable R.A. Green, Jr., and a jury of twelve, at the Union County Courthouse, Lake Butler, Union County, Florida, on Monday, September 26, 1983, through Saturday, October 1, 1983, commencing at the hour of 9:00 o'clock a.m., as reported by William E. Thompson, Official Court Reporter, and Notary Public in and for the State of Florida at Large.

APPEARANCES:

HARRIS TOBIN, Esquire, Assistant State Attorney, for the State of Florida.

FREDERICK REPLOGLE, Esquire, Assistant Public Defender, for the Defendant Bean.

LLOYD L. VIPPERMAN, JR., Esquire, and STEPHEN N. BERNSTEIN, Esquire, Court-appointed Public Defenders, for the Defendant Woods.

Given the present hour, I think it would be in the interest of justice to begin those proceedings tomorrow rather than later today.

That is my intention.

MR. VIPPERMAN: Your Honor, on the subject of closing arguments, during the course of the testimony, Your Honor, I noticed that the audience in the courtroom intend to react to certain witnesses and the way that they testified.

I would ask the Court tomorrow to admonish the audience not to react on closing arguments or make any comment, or that they should not make comment on what is being said or react to what is being said in closing arguments.

THE COURT: Mr. Vipperman, I assume that such an instruction as that would be unnecessary. I think people in this courtroom know, or certainly had better realize, the seriousness of these proceedings and will not countenance to anything that would tend to demean the dignity of the proceedings, in that regard.

Now, if it becomes a problem in the morning, I will deal with it.

MR. VIPPERMAN: Thank you, Your Honor.

THE COURT: Bring in the jury, please.

THE BAILIFF: Yes, sir.

(Thereupon, the jury returned to the courtroom, was seated in the box, and the following further proceedings were had in the presence of the jury:)

THE COURT: All right. What says the State?

MR. TOBIN: The State announces close.

THE COURT: Ladies and gentlemen of the jury, the evidence in these cases is now closed. There remains the arguments of counsel and the instructions of law that you are to apply to the evidence, as you find it.

In order for the attorneys to be acquainted with what instructinos will be given, it is necessary to have an instructions conference. The instructions, in a case such as this, are not finalized until the evidence is closed, since the need for certain instructions may not be apparent until the evidence is over.

So that the attorneys know what instructions will be given, there must be that conference.

The attorneys have discussed with the Court their needs for length of time for the closing arguments. Those closing arguments may approximate an hour per party; that would be an hour for each of the defendants and for the State.

Now, they may not need all of that time but that is an approximation of the total time.

IN THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL
CIRCUIT, INAND FOR UNION
COUNTY, FLORIDA

CASE NO. 83-81-CF

STATE OF FLORIDA,

vs.
RONALD WOODS and
LEONARD BEAN,

Defendants.
_____/

STATE OF FLORIDA)

COUNTY OF UNION)

PROCEEDINGS before the Honorable R.A. Green, Jr., and a jury of twelve, at the Union County Courthouse, Lake Butler, Union County, Florida, on Monday, September 26, 1983, through Saturday, October 1, 1983, commencing at the hour of 9:00 o'clock a.m., as reported by William E. Thompson, Official Court Reporter, and Notary Public in and for the State of Florida at Large.

APPEARANCES:

HARRIS TOBIN, Esquire, Assistant State Attorney, for the State of Florida.

FREDERICK REPLOGLE, Esquire, Assistant Public Defender, for the Defendant Bean.

LLOYD L. VIPPERMAN, JR., Esquire, and STEPHEN N. BERNSTEIN, Esquire, Court-appointed Public Defenders, for the Defendant Woods.

It will be necessary that you remain in place quietly throughout the course of any argument. The order of argument will be the State, the attorney for Mr. Woods —

MR. TOBIN: Excuse me, Your Honor. It will be the attorney for Mr. Woods and then the State.

THE COURT: You are right.

The attorney for Mr. Woods will open, and the State will argue, and then the attorney for Mr. Bean will argue, and then the State will close, and then the attorney for Mr. Woods will close.

You can see from that, it is likely that the Bean argument will approximate an hour, the Woods and State argument may approximate 30 minutes at each time; that is up to the attorneys to decide how they want to break up their arguments.

It will be necessary that you remain in place throughout the course of any argument. It is agreeable and acceptable that, if you need to leave, leave at the end of any one presentation by any of the attorneys.

Mr. Bailiff, don't admit anyone to the courtroom during the arguments, except during the break between arguments. Obviously, if there is some kind of absolute emergency, that is a different story.

I would admonish the relatives of the parties, the relatives of the decedent, if this is going to cause a problem relative to emotions, that you absent yourself before the argument begins. I will not tolerate any outbursts or emotional responses or audible responses through the proceedings today.

I understand that defense has a motion to make.

MR. BERNSTEIN: Your Honor, we would move to have a portion of the spectators cleared. The basis of the motion is

that it is obvious that, en masse, the uniformed correctional officers have come to this trial. We would object to that, Your Honor, in that it impairs a fair and impartial trial of this cause.

We have no difficulty with the right to assemble or the right to be present of the correctional officers. I have no difficulty with the correctional officers making a statement through their dress, through their appearance in support of their fellow officers, or any concern about this trial, or in concern that something be done.

However, as it may affect the jury, as they sit and listen to argument, and then look out in the audience and see 33 out of 45 spectators, in a standing room only crowd, in uniform, it makes a communication to the jury.

I have serious doubts as to whether each of the officers are on their way to work and, therefore, needs to wear a uniform at this time. I expect that this is in the form of a communication.

Again, I have no difficulties with the statement being made. However, I doubt that this is the forum for such a statement, in that the Court how has to deal with the rights of assembly of correctional officers, the right for them to make a statement against the rights of the defendants, to have a jury hear the arguments and consider the evidence without being interfered with, without having an extra testimonial source of information or communication.

I think that the concern here is akin to the Court's concern when they ban the press from covering certain arguments or certain hearings or certain proceedings.

When this Court communicated to the press, in this case, where a witness felt intimidated because of the camera, in the interest of justice the Court communicated with the press. The press then cooperated.

The clash of differing concerns was afforded by cooperation of the local media.

I have made the request of Mr. Tobin to communicate to the correctional officers that I had a sincere hope that such a cooperative effort would be achieved here. And, again, I have no personal difficulty with the statement being made; I have difficulty with the statement being made in such a fashion that it may affect the jurors and I submit to the Court that the appearance, en masse, of uniforms here, has that, at least in part, in mind, and the effect.

It is just obvious, Your Honor, because you can look out in the gallery and you see all of the uniforms.

Again, I think that the Court must weigh the freedoms of both people and, again, I am going to urge the Court to take some action or otherwise I would move for a mistrial, based on, and ask the Court to allow a mistrial, that the Court allow it to be a continuing objection and, if the Court allows it in this argument, as well as any future appearance where the jury will be listening to either evidence or argument, when the gallery is filled to the extent that it is with uniformed correctional officers.

THE COURT: I don't know that I would analogize the gallery as being filled. I don't know what the count of the capacity of this courtroom is. I would imagine that it would approximate 80 to 90 people in the seats, themselves.

There are, to this Court's appearance, about an even or almost an even division of custodial correctional officers uniformed people and people not so attired.

There are certain correctional officers seated up beyond the rail, who have been the security personnel, throughout the trial, and many of the uniformed persons in the courtroom, that I have observed, are persons who testified in their uniforms during the course of the trial.

Your motion to exclude, based upon that, is denied.

Do you wish to make other motions?

MR. BERNSTEIN: Your Honor, as I have announced, I move for a mistrial.

At this point, rather than continuing to file or make such a motion and interrupt the process of the proceedings, if the Court will allow that as a continuing motion, it can be made now, as a matter of record.

THE COURT: I would ask those persons in the courtroom to remain in place and I will ask the Sheriff's Department of Union County to take an appropriate photograph of the gallery from the vantage point of the Bench so that the appearance can be preserved for the record.

We will be in place while that is done.

MR. BERNSTEIN: Your Honor, I might suggest that....